Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona Corporation, *Petitioner*

v.

BAYCHEM CORPORATION, a New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER A.G., a corporation of the Federal Republic of Germany, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

F. TROWBRIDGE VOM BAUR
1700 K Street, N.W.
Washington, D.C. 20006

Of Counsel:

FLORENCE WEIGHT
RICHARD M. PRESTON
VOM BAUR, COBURN, SIMMONS & TURTLE

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
THE CONSTITUTIONAL PROVISION INVOLVED	3
THE STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
The events which occurred in Arizona	7
The convenience of witnesses favors Arizona	9
The Statutes of limitations have run	10
The Decisions of the Courts Below	10
The Court below erroneously described Baychem as a "Foreign Opponent" of Petitioner	12
REASONS FOR GRANTING THE WRIT	14
I. The Court below has decided federal questions in conflict with applicable decisions of this Court	
A. Under this Court's Decisions, the District Court had no power to dismiss a complaint under 28 U.S.C. 1404(a)	14
B. The Circuits are in conflict as to whether a District Court has power to dismiss a complaint on the ground of Forum Non Conveniens	15
C. The Decision below raises significant and recurring problems concerning efforts to invoke Federal diversity jurisdiction	16
D. In the alternative, in dismissing as to Baychem, the Court below abused its discretion	16

Page

E. The holding of the Court below that minimum due process contacts of respondents were not present in Arizona is in conflict with decisions of this Court:

1. The events that occurred in Arizona conferred jurisdiction under Arizona law .. 18

2. The decision below violated the minimum contacts test laid down by this Court ... 20

3. Additional contacts of Bayer de Mexico with Arizona 22

II. On a Motion to dismiss for lack of personal jurisdiction, the complaint and other material should be construed favorably to the plaintiff .. 23

III. In the alternative, questions of Jurisdiction in personam should be postponed to the the trial . 23

CONCLUSION 23

CITATIONS

CASES:

Burt v. Isthmus Dev. Co., (C.A. 5, 1955) 218 F.2d 353, cert. den. 349 U.S. 922, 99 L.Ed. 1254, 75 S.Ct. 661 . 18
Collins v. American Auto Ins. Co. of Missouri, 230 F.2d 416 (2d Cir., 1956) 15
Duple Motor Bodies Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir., 1969) 21
Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (Sup. Ct. Ill., 1961) 21
Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947) 16
Harboldt v. Carpenter, (CA 8, 1976) 536 F.2d 791 15
B. M. Heede Inc. v. West India Machinery & Supply Co., 272 F. Supp. 236 (DCNY, 1967) 15
Jensen v. McInerny, 299 F. Supp. 1309 (D.C. Virgin Islands, 1969) 23
Kisco v. Penn Central Transp. Co., 408 F. Supp. 984 (DC, ND Pa., 1976) 15

Page

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) 21
Levin v. Mississippi River Corp. (D.C.N.Y., 1968) 289 Fed. Sup. 353 15
McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 21
Mobil Tankers Co. S.A. v. Mene Grande Oil Co. (C.A. 3, 1966) 363 F.2d 611, cert. den. 385 U.S. 945, 17 L.Ed. 2d 225, 87 S.Ct. 318 18
Montgomery Ward & Co. v. Schumacher, 3 FRD 368 (D.C. Cal., 1944) 23
Norwood v. Kirkpatrick, 349 U.S. 29, 99 L.Ed. 789, 75 S. Ct. 544 (1955) 14
Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P2d 732 (1966) 21
Prack v. Weissinger (C.A. 4, 1960), 276 F.2d 446 15
Shulman v. Compagnie Generale Transatlantique (D.C. N.Y. 1957) 152 F.Supp. 833 18
United States v. Orshek, 164 F.2d 741 (8th Cir., 1947) . 23
Vanity Fair Mills, Inc. v. T. Eaton Co. (C.A. 2, 1956), 234 F.2d 633 15
Yerostathis v. A. Luisi, Ltd. (C.A. 9, 1967) 380 F.2d, 377 15

MISCELLANEOUS:

28 U.S.C. 1404(a) 4, 18
15 Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction: § 3828 17
Wright and Miller, 5 Federal Practice Procedure: *Civil* § 1363 (1969) 23

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Mizokami Bros. of Arizona, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion, judgment and order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 556 F.2d 975. It is set forth in Appendix A-1. The District Court for the District of

Arizona did not write an opinion. It entered two Judgments dismissing the complaint as to all Respondents, for lack of jurisdiction, which are set forth at A-6-8.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 7, 1977. A timely Motion for rehearing was denied on 26 August, 1977, and this Petition for Certiorari was filed within 90 days of that date. The order denying the motion for rehearing is set forth at A-5. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court, since the passage in 1948 of 28 U.S.C. 1404(a), has the power to dismiss a Complaint on the ground of *forum non conveniens*?

2. In the alternative, whether the District Court abused its discretion in dismissing the Complaint as to Respondent Baychem on the ground of *forum non conveniens* when (a) Petitioner is an Arizona corporation and a citizen of the United States; (b) Baychem is a New Jersey Corporation doing business in Arizona and a U.S. citizen; (c) the claim arose out of events occurring in Arizona; (d) the convenience of witnesses favors Arizona; (e) the statute of limitations has run in Mexico, and also in Arizona due to delays in the Courts below; and (f) there is no other forum in which the action may be brought?

3. Whether there were minimum due process contacts in Arizona of Respondents, Bayer de Mexico and Bayer A.G., when Bayer A.G. purchased the Tamaron, an insecticide, from Baychem in the United States and sold it to Bayer de Mexico, whose distributor sold it to Petitioner in Arizona for delivery in Mexico, said Respondents knowing that some of the said Tamaron would be shipped from Mexico into Arizona on Petitioner's bell peppers and would be found in Arizona to violate U.S. law?

4. Whether there were minimum due process contacts in Arizona when Bayer de Mexico and Baychem, a New Jersey corporation doing business in Arizona, were agents of each other?

5. Whether there were minimum due process contacts in Arizona of Bayer A.G., when it dominated and controlled its subsidiary, Baychem which does business in Arizona, and when Bayer A.G. set the standards worldwide for the use of Tamaron on vegetables.

THE CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law;" . . . .

THE STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1404(a) provides as follows:

> *§ 1404. Change of Venue*:
>
> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U.S.C. 1332(a)(1) and (c) provide in part as follows:

> "§ *1332; Diversity of Citizenship; Amount in Controversy; Costs.*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof;"
>
> * * *
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business:"

The Arizona long-arm Statute, revolving around whether Respondents caused "an event to occur" in Arizona, provides as follows (Arizona Rules of Civil Procedure, sec. 4(e)(2) (1956)):

> "When the defendant is a resident of the state, or is a corporation doing business in the state; *or is a person,* partnership, corporation or unincorporated association subject to suit in a common name *which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose,* service may be had as herein provided, and when so made shall be of the same effect as personal service within the state." (Emphasis added)

STATEMENT OF THE CASE

This is a diversity case founded on 28 USC 1332(a). Petitioner, Mizokami Bros. of Arizona, Inc. is an Arizona corporation with its principal place of business in Nogales, Arizona and is a citizen of the United States (6, 1096).[1] Among other things, it finances the growing of crops in Mexico for importation into the United States (7).

Respondents are part of the Bayer World Group. Bayer A.G. is the parent company. Baychem is the U.S. manufacturing subsidiary of Bayer A.G. It is a New Jersey Corporation with its principal place of business in New York, and has five plants in the United States (648). It does business in Arizona (100, 236, 274, 275). Bayer de Mexico is the Mexican subsidiary of Bayer A.G.

Bayer A.G. developed and patented the product Tamaron, a chemical pesticide. It centrally dominated, controlled, and set the standards for manufacture and sale of Tamaron by Baychem and Bayer de Mexico (10, 360, 706, 1023, 1310, 1311, 1325-1328). Bayer A.G. dominated and controlled its subsidiary, Baychem (1265-1270).

Baychem manufactured the active chemical ingredients of Tamaron in the United States. Bayer A.G. bought the chemical ingredients for Tamaron, and also purchased Tamaron in finished form, from Baychem and then resold the said ingredients and the Tamaron to Bayer de Mexico (10, 11, 209, 289, 290, 298, 310, 313, 361, 776, 1004, 1005, 1015, 1269, 1410).

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[1] Parenthetical citations refer to the page number in the record on appeal to the Court below.

Baychem and Bayer de Mexico are the agents of each other (10, 18, 26). Under the Agreement between the Chemagro division of Baychem dated 15 January 1973, Bayer de Mexico was constituted the "mediator", that is, the intercessor, interagent and agent of Chemagro with regard to the sale of Chemagro agricultural products, including Tamaron, in Mexico. Also, under the Agreement, Bayer de Mexico agreed to obtain orders from purchasers in Mexico to buy Chemagro products, but was not given the power to accept those orders in Mexico. Indeed, the orders so obtained in Mexico by Bayer de Mexico could only be accepted by Chemagro in the United States (289, 290, 999, 1000, 1356-1359). Hence, Bayer de Mexico and Baychem became the agents of each other in connection with the sale of agricultural products in Mexico, including Tamaron. Thus, such acts of Bayer de Mexico and Baychem, Chemagro became binding on each other.

In addition, Bayer de Mexico received instructions, technical information, and "technical material" regarding the proper use of insecticides, including Tamaron, from Bayer A.G. and Baychem (11, 12, 25, 149, 210, 222, 773, 776).

Petitioner financed growers in Mexico, advancing them funds for the growing of bell peppers and other vegetables (7). During the growing season 1972-1973, Petitioner advanced $1 million to finance the growing of vegetables, including 250 acres of bell peppers in Mexico destined for importation into Arizona (16,1047, 1052, 1057). Title to the bell peppers vested at all times in Petitioner. (7)

Petitioner purchased the Tamaron from Vamex, Bayer de Mexico's distributor, by checks drawn on an

Arizona bank, for delivery in Mexico (1049, 1060). All the Respondents knew that such Tamaron was being purchased by Petitioner for use on peppers grown for export into Arizona and for consumption in the United States and Canada, and that it was necessary for the U.S. Environmental Protection Agency (EPA) to establish tolerances for the use of Tamaron on bell peppers (17-19). Indeed, Respondents both expressly and impliedly warranted that Tamaron was suitable for use on Petitioner's bell peppers intended for importation into Arizona (23, 27).

The Federal Insecticides, Fungicide, and Rodenticide Act, 7 U.S.C. 135 et seq., and the Federal Food Drug and Cosmetic Act, 21 U.S.C. 301, 331, prohibit the shipment in interstate commerce of a pesticide for which no tolerance for a specified commodity has been established.

The Events Which Occurred in Arizona:

A railroad runs from Los Mochis, in the Mexican State of Sinaloa, to Nogales, Mexico, which is across the border from Nogales, Arizona. Petitioner's bell peppers were shipped in vans, that is, truck trailers carried piggyback on that railroad from Los Mochis to Nogales, Mexico. There three individual trailers were unloaded from the train and were hauled by tractors through the international gate and across the border into Nogales, Arizona (779, 1193).

When Petitioner's bell peppers containing Tamaron arrived in these trailers in interstate commerce in Nogales, Arizona, these events occurred in Arizona:

(a) In Nogales, Arizona, the FDA took samples of Petitioner's bell peppers located in Arizona, conducted

tests, and determined that there was no established tolerance for the Tamaron contained in Petitioner's said bell peppers and that the shipments violated U.S. laws (20, 21, 779, 780);

(b) In Nogales, Arizona, the FDA directed that Petitioner's bell peppers which had been imported into Arizona be destroyed, and they were destroyed (20, 21, 779);

(c) In Nogales, Arizona, the FDA caused an embargo to be placed by U.S. Customs on the further importation of bell peppers into the United States (20, 22, 779-781); and

(d) In Nogales, Arizona, the FDA notified Petitioner, at his office in Nogales, Arizona, that an embargo had been placed by U.S. Customs on the further importation of peppers into Arizona, and that no further peppers would be importable into Arizona (20, 21, 779).

(e) In Nogales, Arizona, Petitioner directed that further exportation of peppers from Mexico to Arizona cease immediately (20, 1069).

Meanwhile, in Nogales, Arizona, some reshipment had taken place. The bell peppers that had arrived at Petitioner's warehouse in Nogales, Arizona were all unloaded, and some were then re-loaded in trucks and shipped to Canada (20, 1069). There they were rejected by the Canadian authorities under Canada's reciprocity agreement with the U.S., were required to be destroyed, and were destroyed (20, 1055, 1056, 1069, 1179-1184, 1193).

Because of the embargo caused in Arizona to be placed prohibiting the importation of bell peppers into

the United States, a major part of Petitioner's peppers grown in Mexico could not be imported and had to be destroyed (20, 1069).

Petitioner brought suit against Baychem, Bayer de Mexico and Bayer A.G. in the United States District Court for the District of Arizona on grounds of product liability, misrepresentation, and breach of warranty, and sought damages in the amount of $3,000,000.

The Convenience of Witnesses Favors Arizona:

The convenience of witnesses favors Arizona. First, Petitioner and its main witnesses who have a general knowledge of the case, Richard Kellett, Mike Mizokami and Tom Mizokami are available there.

Second, all other witnesses who can testify to the events which occurred in Arizona are located in Arizona. Petitioner's documents showing the bell pepper crops imported into the United States, are located in Arizona (1091). Also, Petitioner's broker, William Joffroy, who can testify as to transactions with the FDA in Arizona, is located there (779).

Douglas Payne, the FDA supervisor is also located in Arizona. He was in charge of the portable FDA laboratory in Nogales, and made the determinations that the Tamaron which had arrived in Arizona on Petitioner's bell peppers violated U.S. law (780, 1232). The U.S. Government records showing the seizure of the peppers in Arizona, are located in Arizona (1086).

Kellett and Mike Mizokami can also testify as to the re-loading in Arizona of some of the bell peppers for shipment to Canada, and their rejection by the Canadian authorities, with resulting destruction.

As for the destruction of the peppers in Arizona and Mexico, Kellett and Tom Mizokami directed their destruction (1069, 1072, 1076).

Baychem witnesses, such as Charles Roevner, Dr. Andersen and others, are located in Arizona or the United States. The technicians of the Harris Laboratory, which tested the Tamaron, are located in Arizona. (781, 783).

Kellett, Mike Mizokami and Tom Mizokami visited the growing area in Mexico frequently, and are fully familiar with the events which took place there. They are also familiar with the application of Tamaron on the peppers in Mexico, the shipments of the bell peppers into Arizona, etc. Copies of the Bayer de Mexico literature recommending Tamaron on bell peppers are already in the record. (36-43)

Some other testimony of events occurring in Mexico may be needed. But in quantity and quality, testimony as to events in Mexico will not compare with the evidence of the controlling events which occurred in Arizona that will be required.

The Statutes of Limitations Have Run:

Meanwhile, the short Statute of Limitations in Mexico has run (1278, 1406). The four year Statute of Limitations in Arizona has also run because of the delays in the Courts below. 12 A.R.S. 544, 550.

The Decisions of the Courts Below:

Over 4 years have elapsed since the Complaint was filed on 26 October 1973 (6). Over 18 months thereafter, on 27 May 1975, the District Court "dismissed"

the complaint, with costs (1412, 1414). It wrote no opinion (1412-1415).

The case then took over two more years to reach the Court of Appeals for the Ninth Circuit. On 7 July 1977, that Court affirmed the District Court in a short opinion. It admitted that the case was novel as to Baychem and that there was no precedent for its extreme decision. It cited no precedent (A-3).

As to Baychem, the Court below affirmed the dismissal of the Complaint against Baychem, on the ground of *forum non conveniens.* It admitted that "a defendant must carry an almost impossible burden in order to deny a citizen access to the courts of this country". Then, however, the Court below proceeded to make astounding errors. Among others, it stated that "all transactions between the parties, as well as the claim itself, arose in Mexico". It further stated that "The only effect alleged in Arizona was the loss to Mizokami when the chemically treated vegetables failed to gain entry into the United States."

Indeed, these are colossal errors. The undisputed facts show that the claim arose, not in Mexico, but in Arizona and because of a finding that Petitioner's bell peppers containing Tamaron, having arrived in Arizona, were there held to violate U.S. laws. It was in Arizona that the chemicals formulated by Respondents exploded in a legal sense and created the catastrophe out of which the claim arose. Moreover, in Arizona Petitioner ordered the Tamaron from Vamex, the distributor or agent of Bayer de Mexico, paying by checks drawn on an Arizona bank (1049, 1060).

The Court below also erroneously stated (A-1) that Petitioner sustained losses "when United States

Customs Officers turned back a shipment of bell peppers at the Mexican border". But no U.S. Customs Officer ever turned back a shipment of Petitioner's bell peppers at the Mexican border or anywhere else. See p. 7, 8.

The Court also made the amazing statement (page A-2) that "the business done in Arizona by Baychem was unrelated to the claim". The fact is that Baychem sold the very Tamaron in question to Bayer A.G. for delivery to Bayer de Mexico, knowing that some of the Tamaron so sold would be imported into Arizona on Petitioner's peppers. Moreover, Baychem was selling, in Arizona as "Monitor 4", the very chemical sold in Mexico as Tamaron. Monitor 4 had been registered in the U.S. for certain other crops, but not for peppers. Thus, Baychem had not, in March 1973 been caught for its failure to register Monitor 4 on bell peppers in connection with its Arizona business (1233). Hence, when Baychem was finally jolted into applying for a registration of Tamaron, it also applied for the registration of Monitor 4 (966).

The Court Below Erroneously Described Baychem as a "Foreign Opponent" of Petitioner:

The Court below also erroneously stated, in a reference to Petitioner (A-4), that "when their foreign operations lead to litigation they cannot expect always to bring their *foreign opponents* into a United States forum. . . (Emphasis added). The implication is that Baychem is a "foreign opponent", of Petitioner. But such a characterization is another astounding error. Baychem is a New Jersey corporation doing considerable business in Arizona and a citizen of the United States. The Court below simply confused Bay-

chem, the U.S. subsidiary, with the corporations organized under the laws of foreign countries, Bayer A.G. and Bayer de Mexico. Then, apparently on the theory that Baychem was a corporation organized under the laws of a foreign country, the Court below dismissed the complaint as to Baychem on the ground of *forum non conveniens.*

Moreover, it was not the "foreign operations," but the events caused by Respondents to occur in Arizona that created liability and the litigation. These included the event that the chemicals arriving in Arizona which had been furnished by Respondents, were found to violate U.S. law.

As to Bayer de Mexico. The Court below erroneously held that Petitioner merely "alleges that Bayer de Mexico knew or should have known that the chemical would be used on crops intended for United States markets, including Arizona. These allegations do not provide the minimum contacts required by the Due Process Clause for personal jurisdiction". On its face, we submit that this cryptic statement is in error. In addition, the Court below simply failed to absorb the allegations of the Complaint. The Complaint alleged that all the Respondents furnished chemical insecticides to Petitioner in Mexico, knowing that Tamaron would be imported into Arizona on Petitioner's bell peppers. Then when Respondents' chemicals arrived in Arizona aboard Petitioner's bell peppers, they exploded in Arizona—not physically, but in a legal sense —for in Arizona the chemicals were determined to violate U.S. laws. These facts satisfy the due process clause. See post, p. 18-22.

As to Bayer A.G., the Court below merely dismissed the Complaint. It made no mention of the fact that all the Tamaron in Mexico was furnished by Bayer A.G. to Bayer de Mexico, knowing that some of it would wind up on Petitioner's bell peppers imported into Arizona, and there violate U.S. law. Nor did it mention the other undisputed facts set forth above, p. 5-9.

In addition, Bayer A.G. dominates and controls its subsidiaries and agents, Baychem and Bayer de Mexico (10, 1265-1270). And Bayer A.G. set the standards for the use on vegetables of Tamaron distributed by Bayer de Mexico. See page 5.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW HAS DECIDED FEDERAL QUESTIONS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A. Under This Court's Decisions, The District Court Had No Power to Dismiss a Complaint Under 28 U.S.C. 1404(a):

In dismissing the complaint against Baychem on the ground of *forum non conveniens*, the decision of the Court below is in conflict with this Court's decision on April 11, 1955, in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 99 L. Ed. 789, 75 S. Ct. 544 (1955). That case held that the power to dismiss cases on the ground of *forum non conveniens* was eliminated by the enactment of 28 U.S.C. 1404(a). It said:

> "When Congress adopted § 1404(a), it intended to do more than just codify the existing law on forum non conveniens. As this Court said in Ex parte Collett, 337 US 55-61, 93 L ed 1207-1211, 69 S Ct 944, 959, 10 ALR2d 921, Congress, in writing § 1404(a), which was an entirely new section, was

> revising as well as codifying. *The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer.* When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification." (Emphasis added) 349 U.S. 32.

B. The Circuits Are in Conflict as to Whether a District Court Has Power to Dismiss a Complaint on the Ground of Forum Non Conveniens:

A conflict exists in the Circuits. In the Second, Third, and Eighth Circuits some cases have followed the holding in the *Norwood* case that under 28 USC 1404(a) there is no power to dismiss the case on the ground of *forum non conveniens*. *Collins* v. *American Auto Ins. Co. of Missouri*, 230 F.2d 416. (2d Cir., 1956) *B.M. Heede Inc.* v. *West India Machinery & Supply Co.*, 272 F. Supp. 236 (DCNY, 1967). *Harboldt* v. *Carpenter* (C.A. 8, 1976), 536 F.2d 791. *Kisco* v. *Penn Central Transp. Co.*, 408 F. Supp. 984 (DC, ND Pa., 1976).

Since April 11, 1955, the date of the *Norwood* decision, cases in the Ninth and Fourth Circuits, and some cases in the Second Circuit, have dismissed complaints on the ground of *forum non conveniens* where the parties were foreign nationals and the claim arose in a foreign country. *Yerostathis* v. *A. Luisi, Ltd.* (C.A. 9, 1967), 380 F.2nd, 377; *Prack* v. *Weissinger* (C.A. 4, 1960), 276 F.2d 446; *Vanity Fair Mills, Inc.* v. *T. Eaton Co.* (C.A. 2, 1956), 234 F.2d 633 and see *Levin* v. *Mississippi River Corp.* (D.C.N.Y., 1968), 289 Fed. Sup. 353. But no case has ever dismissed a complaint on that ground where, as in our case, both parties are United States citizens and the claim arose in the United States.

C. The Decision Below Raises Significant and Recurring Problems Concerning Efforts to Invoke Federal Diversity Jurisdiction:

The decision below raises significant problems concerning efforts to invoke Federal diversity jurisdiction. The right of a citizen of the United States to sue another citizen of the United States in a diversity case where there is a foreign element, is now in serious jeopardy. Unless precluded by this Court, now there will be more motions to dismiss complaints where there is a foreign element in cases between U.S. citizens, and more appeals. Thus the decision below must necessarily give rise to further litigation and confusion. Hence, we submit that the questions raised should be settled by this Court and unnecessary litigation prevented.

D. In the Alternative, In Dismissing as to Baychem, The Court Below Abused Its Discretion:

The Court below admitted that its decision dismissing the complaint as to Baychem on the ground of *forum non conveniens* was novel. See A-3. But it is more than novel. It is utterly unsupported by precedent or by principle. Moreover, it was based on the misconception that Baychem was a "foreign opponent", rather than a New Jersey corporation doing business in Arizona and a U.S. citizen.

In addition, the decision below is *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947) in reverse. For, despite the existence of overwhelming bases for jurisdiction, the decision below arbitrarily extinguished Petitioner's claim, leaving Petitioner with no remedy at all.

Arguing in the alternative, even if, contrary to the principle stated in *Norwood* quoted above, Federal District Courts still have the discretion to dismiss a

case on the ground of *forum non conveniens,* the Court below grossly abused any such discretion on these facts: (1) Petitioner is an Arizona corporation and a citizen of the United States; (2) Respondent Baychem is a New Jersey Corporation doing a considerable amount of business in Arizona and a citizen of the United States; (3) the claim arose in Arizona; (4) the convenience of witnesses favors Arizona; (5) the Statute of Limitations has run in Mexico and in Arizona; and (6) there is no other forum in which the action can be brought.

Second, it is in any event an abuse of discretion to dismiss a case on the ground of *forum non conveniens* when it is not absolutely certain that jurisdiction of all parties and complete relief can be obtained in a supposedly more convenient Court. As is stated in 15 Wright, Miller and Cooper, *Federal Practice and Procedure, Jurisdiction:* § 3828:

> Dismissal on the basis of forum non conveniens requires that there be in fact an alternative forum in which the suit can be maintained. It must appear to a certainty that jurisdiction of all parties can be had and that complete relief can be obtained in the supposedly more convenient court. (Ten authorities cited)

In our case, there is a complete absence of any forum other than the Federal Court in Arizona, in which the suit may be brought against Respondents and complete relief may be had. And the Statute of Limitations has run in Mexico, and also in Arizona. See p. 10. The Court below arbitrarily extinguished Petitioner's claim.

Third, a citizen of the United States is entitled to special consideration in *forum non conveniens* cases.

Mobil Tankers Co. S.A. v. *Mene Grande Oil Co.* (C.A. 3, 1966) 363 F.2d 611, cert. den. 385 U.S. 945, 17 L.Ed. 2d 225, 87 S.Ct. 318; *Burt* v. *Isthmus Dev. Co.*, (C.A. 5, 1955) 218 F.2d 353, cert. den. 349 U.S. 922, 99 L.Ed. 1254, 75 S.Ct. 661. *Shulman* v. *Compagnie Generale Transatlantique* (D.C.N.Y. 1957) 152 F.Supp. 833.

Fourth, in arbitrarily extinguishing Petitioner's claim, the Court below emasculated 28 U.S.C. 1404(a); and also the statutory provisions providing for federal jurisdiction on the ground of diversity of citizenship, 28 U.S.C. 1332, etc. It went to an extreme not approached by any other case. It decided important questions which should be decided by this Court. It also reflects the conflict in the circuits, which conflict will affect numerous other litigants and create unnecessary litigation.

E. The Holding of the Court Below That Minimum Due Process Contacts of Respondents Were Not Present in Arizona Is in Conflict With Decisions of This Court:

1. The events that occurred in Arizona conferred jurisdiction under Arizona law:

The dismissal by the Court below of the action against Bayer de Mexico and Bayer A.G. on the ground of lack of *in personam* jurisdiction under the Arizona long-arm statute is flatly inconsistent with the minimum contacts test as laid down by this Court.

The law of Arizona provides for service of process upon a foreign defendant provided that the defendant has "caused an event to occur in this state out of which the claim which is the subject of the complaint arose". Rule 4(e)(2)(a), Rules of Civil Procedure, 16 A.R.S. See p. 4. Ordinarily, the exercise of jurisdiction

under this provision is reached by a two-stage analysis: (1) Whether the defendant has caused an event to occur in Arizona out of which the claim which is the subject of the complaint arose; and (2) whether the defendant has minimum contacts with Arizona such that the exercise of personal jurisdiction over him will be in conformity with the requirements of due process. The lower court's analysis of these questions was as follows:

> "Neither Bayer de Mexico nor Bayer AG did business in Arizona, and neither acted within the forum. The only effect alleged in Arizona was the loss to Mizokami when the chemically treated vegetables failed to gain entry into the United States.
>
> * * *
>
> Plaintiff alleges that Bayer de Mexico knew or should have known that the chemical would be used on crops intended for United States markets, including Arizona. These allegations do not provide the minimum contacts required by the Due Process Clause for personal jurisdiction." (A-2).

First, with respect to the beginning of the analysis, it does not state clearly whether the Court below held that defendant caused an event to occur in Arizona such that the Arizona statute's requirements were satisfied. To the extent that the Court below concluded that defendant did not cause an event to occur in Arizona, its decision was in serious factual error (see p. 7-8).

Moreover, aside from the serious factual errors of the Court below, to the extent that it concluded that no event occurred in Arizona, its decision is also flatly inconsistent with the Arizona Supreme Court's interpretation of its long-arm statute. Thus, in *Phillips* v.

Anchor Hocking Glass Corporation, 100 Ariz 251, 413 P2d 732 (Ariz Sup Ct., 1966), the Court stated that in cases of tort or product liability, a manufacturer causes an event to occur within the forum when he puts his product into the stream of commerce and the product eventually causes an injury to occur within the forum State. The case arose when a baking dish manufactured by defendant broke and injured plaintiff. The defendant's only contact with Arizona was the presence of the product in the State when the injury occurred. The Superior Court dismissed the complaint. But the Supreme Court reversed and remanded the case for consideration whether the exercise of jurisdiction under the statute was in conformity with the requirements of due process.

This reasoning is equally applicable to the instant case. The Respondents put their product, Tamaron, into the stream of commerce. Vegetables treated with the chemical reached the forum State; were tested in Arizona; and were there found to be in violation of Federal law. Then the FDA in Arizona caused an embargo to be imposed on further importation of peppers. Thus, all the Respondents caused events to occur in Arizona out of which the claim arose within the meaning of the statute as interpreted by the Arizona Supreme Court.

2. The decision below violates the minimum contacts test laid down by this Court:

With respect to the second half of the analysis, the decision of the Court below is inconsistent with the minimum contacts test laid down by this Court. Indeed, the minimum contacts test laid down by this Court is clear. A forum may exercise jurisdiction over a foreign defendant consistently with the requirements

of due process provided that the defendant has minimum contacts with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945). Moreover, in appropriate circumstances, a single contact by the defendant with the forum may be sufficient to uphold jurisdiction. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

In addition, other decisions that apply the minimum contacts test to cases of tort or product liability have held that when a manufacturer places a product into the stream of commerce, the product reaches the forum State, and injury occurs in the forum, it is consistent with the requirements of due process to require the manufacturer to defend his product in the forum State. *Gray* v. *American Radiator and Standard Sanitary Corp.* 22 Ill. 2d 432, 176 N.E.2d 761 (Sup Ct. Ill., 1961) *Duple Motor Bodies Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir., 1969).

Moreover, in *Phillips* v. *Anchor Hocking Glass Corp.,* 100 Ariz 251, 413 P2d 732 (1966), *supra,* the Arizona Supreme Court found that these principles apply when jurisdiction is asserted under the Arizona long-arm statute. Indeed, the Court went even further than some jurisdictions and held that the foreseeability of the product's entry into the forum state was not a necessary prerequisite to jurisdiction. It said:

> "We do not think foreseeability itself is a necessary prerequisite to fairness. Cf Note, Products Liability and the Choice of Law, 78 Harv LR 1452. Ordinarily, a manufacturer is primarily interested in the consumption of his product, not where it is consumed. ***If his product is defective he may be***

> *held liable for the damage caused thereby whether suit is brought in his state or plaintiff's state.* The manufacturer should not necessarily be allowed to divorce himself from liability for a defective product solely because he cannot foresee where it will be consumed." 413 P2d at 737. (Emphasis added)

In the instant case, all the Respondents put their chemical product, Tamaron, into the stream of commerce; each Respondent had reason to foresee (though foreseeability is not necessary) that the chemical product would be applied to vegetables grown for exportation into Arizona. In fact, vegetables containing the residue of their product were physically imported into and present in Arizona and events occurred in Arizona: the FDA there caused the peppers physically located in Arizona to be destroyed, and an embargo to be imposed upon the further importation of peppers.

Thus, the elements needed to assert jurisdiction under the Arizona statute consistently with the requirements of due process were present. The holding of the Court below that Plaintiff's allegations did not provide the minimum contacts required by the Due Process clause is flatly inconsistent with the minimum contacts test as laid down by this Court, and as interpreted by the highest court of the State of Arizona.

3. Additional contacts of Bayer de Mexico with Arizona:

In addition, Bayer de Mexico and Baychem are mutual agents, and the actions of each are binding upon the other. See p. 6. It is fundamental that the principal is bound by and liable for the acts which his agent does within the scope of his authority. Restatement (Second) of Agency § 140 (1958).

II. ON A MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, THE COMPLAINT AND OTHER MATERIAL SHOULD BE CONSTRUED FAVORABLY TO THE PLAINTIFF:

Motions to dismiss for lack of personal jurisdiction or lack of a convenient forum are commonly decided, as in our case, on the pleadings and special material outside the pleadings. There has been no trial. Hence, for the purpose of ruling on such motions, the pleadings and other material should be construed favorably to the Plaintiff. Wright and Miller, 5 *Federal Practice and Procedure: Civil* § 1363 (1969). *Jensen* v. *McInerney,* 299 F. Supp. 1309 (D.C., Virgin Islands, 1969). *United States* v. *Orshek,* 164 F.2d 741 (8th Cir., 1947).

III. IN THE ALTERNATIVE, QUESTIONS OF JURISDICTION IN PERSONAM SHOULD BE POSTPONED TO THE TRIAL:

Finally, if there should be any question as to jurisdiction *in personam* over Respondents, decisions on that question should be postponed to the trial when discovery, so far resisted by Respondents, can be had and all the facts can be developed, *Montgomery Ward & Co.* v. *Schumacher,* 3 FRD 368 (D.C. Cal., 1944).

CONCLUSION

For the reasons stated,

1. The Petition should be granted and the judgments below summarily reversed; or

2. The Petition should be granted and the case set for oral argument; or

3. The case should be summarily reversed as to Baychem, and remanded to the District Court with instructions to postpone, until the trial, decisions on

jurisdiction over Respondents Bayer de Mexico and Bayer A.G.

Respectfully submitted,

F. TROWBRIDGE VOM BAUR
1700 K Street, N.W.
Washington, D.C. 20006

Of Counsel:

FLORENCE WEIGHT
RICHARD M. PRESTON
VOM BAUR, COBURN, SIMMONS & TURTLE

November 23, 1977

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2991

MIZOKAMI BROS. OF ARIZONA, INC.,
an Arizona corporation,
Appellant,

v.

BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; BAYER AG, a corporation of the Federal Republic of Germany; and COMPANIA VAMEX DE LOS MOCHIS, S.A., a corporation of the United States of Mexico,
Appellees.

Opinion

(filed July 7, 1977)

Before: ELY and GOODWIN, *Circuit Judges,* and SOLOMON,* *District Judge.*

Per Curiam:

Mizokami Bros. of Arizona, an importer of Mexican-grown produce for sale in the United States and Canada, sustained losses when United States Customs officers turned back a shipment of bell peppers at the Mexican border because the vegetables were contaminated with excessive residues of the chemical Tamaron. Mizokami sued Bayer AG and its corporate children, Bayer de Mexico and Baychem, in the United States District Court for the District of Arizona. The court dismissed the action against the first

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

two defendants for want of *in personam* jurisdiction under Arizona's long-arm statute and against the third for reasons of *forum non conveniens*. We affirm.

Baychem manufactured the Tamaron in Missouri for Bayer AG, the world patent owner, who in turn sold it to Bayer de Mexico. Eventually it was sold to Mexican farmers who used it on crops bought by Mizokami. Neither Bayer de Mexico nor Bayer AG did business in Arizona, and neither acted within the forum. The only effect alleged in Arizona was the loss to Mizokami when the chemically treated vegetables failed to gain entry into the United States.

Mizokami attempted to predicate long-term liability against Bayer AG, the German parent of both Baychem and Bayer de Mexico, on the theory that Baychem, a subsidiary of Bayer AG, did business in Arizona. However, the business done in Arizona by Baychem was unrelated to the claim, and the mere existence of the parent-subsidy relationship is not alone a sufficient basis for long-arm jurisdiction of the parent. *Lycoming Division of Avco Corp.* v. *Superior Court*, 22 Ariz. App. 150, 524 P.2d 1323, 1326 (1974). Bayer AG was not alleged to have any other connection with Arizona.

Plaintiff alleges that Bayer de Mexico knew or should have known that the chemical would be used on crops intended for United States markets, including Arizona. These allegations do not provide the minimum contacts required by the Due Process Clause for personal jurisdiction. *See International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *Amba Marketing Systems, Inc.* v. *Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977); *L. D. Reeder Contractors* v. *Higgins Industries, Inc.*, 265 F.2d 768, 773-774 (9th Cir. 1959). To the extent that the district court grounded its dismissal upon the failure of the complaint to allege facts establishing *in personam* jurisdiction, the judgment must be affirmed.

The dismissal of Mizokami's action against Baychem on the ground of *forum nonconveniens* must also be affirmed. The determination of the appropriateness of the doctrine is entrusted to the sound discretion of the trial court. *Paper Operations Consultants International, Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975).

Here, an Arizona corporation seeks to maintain an action in a court of the United States against a Delaware corporation which has its headquarters in Missouri. Such cases are filed in the federal courts daily. But we have been cited no case in which the facts are quite like those presently before us. Numerous cases suggest that a defendant must meet an almost impossible burden in order to deny a citizen access to the courts of this country. We note particularly *Burt* v. *Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955), wherein the court stated:

> " • • • [C]ourts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country. • • •" 218 F.2d at 357.

See also Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Olympic Corp.* v. *Societe Generale*, 462 F.2d 376 (2d Cir. 1972); *Hoffman* v. *Goberman*, 420 F.2d 423 (3d Cir. 1970); *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F.2d 611 (3rd Cir.), *cert. denied*, 385 U.S. 945 (1966).

Despite the strong statements in favor of access, however, a United States citizen has no absolute right to sue in a United States court. *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956). Application of the *forum non conveniens* doctrine affords wide discretion to the district court. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).

The district court properly exercised its discretion in the present case. The plaintiff corporation claimed a relationship, not clearly defined, with certain Mexican growers. The complaint was of misrepresentations made to the growers in Mexico with respect to a chemical manufactured in Missouri and sold in Mexico by the defendants. All transactions between the parties, as well as the claim itself, arose in Mexico.

The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.

There was no abuse of discretion.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

Order

(filed August 26, 1977)

Appeal from the United States District Court
for the District of Arizona

Before: ELY and GOODWIN, *Circuit Judges,* and SOLOMON,* *District Judge.*

The court has considered appellant's petition for rehearing filed July 22, 1977; the petition is denied.

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* The Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action File No. 73-188 TUC JAW

MIZOKAMI BROS. OF ARIZONA, INC.,
an Arizona corporation,

vs.

BAYCHEM CORPORATION, A Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; BAYER AG, a corporation of the Federal Republic of Germany; and COMPANIA VAMEX DE LOS MOCHIS, S.A., a corporation of the United States of Mexico,

Judgment

(filed May 27, 1975)

This action came on for (hearing) before the Court, Honorable James A. Walsh, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, granting defendants' Motion to Dismiss,

It is Ordered and Adjudged that the plaintiff, MIZOKAMI BROS. OF ARIZONA, INC., take nothing and that the action is dismissed as to defendants BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico and BAYER AG, a corporation of the Federal Republic of Germany.

Dated at Tucson, Arizona, this 27th day of May, 1975.

W. J. FURSTENAU
Clerk of Court

/s/ LOUISE CLELLAND
By: Louise Clelland,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

Judgment

(June 19, 1975)

This matter having come on for hearing on July 1, 1974 and again on May 24, 1975 on the respective motions on behalf of defendants Bayer AG, a corporation of the Federal Republic of Germany, and Bayer de Mexico, S.A., a corporation of the United States of Mexico, to quash the attempted service of process herein against said defendants for lack of personal jurisdiction over them and the motions on behalf of said defendants and also Baychem Corporation to dismiss this action pursuant to Rule 19(b) of the Federal Rules of Civil Procedure on the ground of *forum non conveniens*, upon the basis of the affidavits submitted in respect of said motions and, as well, the answers to interrogatories and the entire record herein, including the submissions of counsel for plaintiff and for each of said defendants and the oral arguments presented by counsel for plaintiff and counsel for each of said defendants at said hearings, and for the reasons stated in the opinion of the Court expressed at the conclusion of the hearing on May 24, 1975,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the attempted service of process herein against defendant Bayer AG, a corporation of the Federal Republic of Germany, and, as well, the attempted service of process against defendant Bayer de Mexico, S.A., a corporation of the United States of Mexico, is hereby quashed, the complaint herein is hereby dismissed against said defendants and also against Baychem Corporation and judgment, together with an award for costs, is hereby entered in favor of each of said defendants against plaintiff.

DONE IN OPEN COURT this ..... day of June, 1975.

/s/ JAMES A. WALSH
United States District Judge

The foregoing Judgment lodged with the Court this 5th day of June, 1975 and Copy mailed this 5th day of June, 1975, to:

JOHNSON, HAYES & DOWDALL
Attn: John G. Stompoly
250 North Church Avenue
Tucson, Arizona 85701
and
VOM BAUR, COBURN, SIMMONS & TURTLE
Attn: F. Trowbridge vom Baur
1700 K Street, N.W.
Washington, D.C. 20006
Attorneys for Plaintiff

BROWN, VLASSIS & BAIN
Attn: Jack E. Brown
222 North Central, 9th Floor
Phoenix, Arizona 85004
Attorneys for Defendant BAYER, AG
a corporation of the Federal
Republic of Germany

CHANDLER, TULLAR, UDALL & RICHMOND
Attn: Jack I. Redhair
177 North Church, Suite 1110
Tucson, Arizona 85701
Attorneys for Defendant BAYCHEM CORPORATION,
a Delaware and New Jersey corporation

/s/ M. J. MEEHAN, FOR
JOHN F. MOLLOY
for ROBERTSON, MOLLOY, FICKETT & JONES, P.C.
P. O. Box 2268
Tucson, Arizona 85702
Attorneys for Defendant BAYER DE MEXICO, S.A.,
a corporation of the United States of
Mexico

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona corporation,
Petitioner,

v.

BAYCHEM CORPORATION, a New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,
Respondents.

BRIEF OF BAYER AG IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACK E. BROWN
PHILIP R. HIGDON
EUGENE D. COHEN
222 North Central Avenue
Phoenix, Arizona
Attorneys for Respondent, Bayer AG

Of Counsel:

BROWN & BAIN, P.A.
222 North Central Avenue
Phoenix, Arizona

December 21, 1977

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
RESTATEMENT OF THE QUESTIONS PRESENTED	2
RESTATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	6
I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS THAT THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER BAYER AG IS CONSISTENT WITH INTERPRETATIONS BY ARIZONA COURTS OF THE ARIZONA LONG-ARM STATUTE AND WITH THIS COURT'S REQUIREMENTS OF CONSTITUTIONAL DUE PROCESS	6
A. As a Matter of Arizona Law, Bayer AG Has Not Caused an Event to Occur in Arizona Out of Which the Claim Which Is the Subject of the Complaint Arose	6
B. Any Decision Other Than the Ninth Circuit's, That the District Court Did Not Have Jurisdiction Over Bayer AG, Would Offend the Guarantee of Due Process	9
II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER CIRCUIT IN HOLDING THAT THIS SUIT WAS PROPERLY DISMISSED ON GROUNDS OF *Forum Non Conveniens* SINCE THE MORE CONVENIENT FORUM IS IN A FOREIGN COUNTRY	11
III. NEITHER THE JURISDICTIONAL ISSUE, WHICH MAY BE DECIDED UNDER ARIZONA LAW WITHOUT REACHING PETITIONER'S CONSTITUTIONAL ARGUMENT, NOR THE *Forum Non Conveniens* ISSUE, WHICH RELATES ONLY TO THE PROPRIETY OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION, MERITS THIS COURT'S ATTENTION	14
CONCLUSION	15

TABLE OF AUTHORITIES

PAGE

CASES:

B.M. Heede, Inc. v. West India Machinery & Supply Co., 272 F. Supp. 236 (S.D.N.Y 1967) 13n
Blount v. Peerless Chemicals (P. R.) Inc., 316 F.2d 695 (2d Cir. 1963) 10-11
Collins v. American Automobile Insurance Co., 230 F.2d 416 (2d Cir. 1956) 13n
Gross v. Owen, 221 F.2d 94 (D.C. Cir. 1955) 12n
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 15
Hanson v. Denckla, 357 U.S. 235 (1958) 9, 10
Harbolt v. Carpenter, 536 F.2d 791 (8th Cir. 1976) 13n
Houghton v. Piper Aircraft Corp., 112 Ariz. 365, 542 P.2d 24 (1975) 7
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 9-10
J.F. Pritchard & Co. v. Dow Chemical of Canada, Ltd., 462 F.2d 998 (8th Cir. 1972) 12n, 13n
Kisko v. Penn Central Transportation Co., 408 F. Supp. 984 (M.D. Pa. 1976) 13n
McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) 6n
Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 12
Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber, 513 F.2d 667 (9th Cir. 1975) 12n
Phillips v. Anchor Hocking Glass Corp., 100 Ariz., 251, 413 P.2d 732 (1966) 7, 8, 10n
Prack v. Weissinger, 276 F.2d 446 (4th Cir. 1960) .....12 & n
Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968) 14

PAGE

Taylor v. Portland Paramount Corp., 383 F.2d 634 (9th Cir. 1967) 9
The Belgenland, 114 U.S. 355 (1885) 15
Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) 12n
Yerostathis v. A. Luisi, Ltd., 380 F.2d 377 (9th Cir. 1967) 12n

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. V (Due Process Clause) 9
U.S. CONST. amend. XIV, § 1 (Due Process Clause) 9

STATUTES AND RULES:

28 U.S.C. § 1404(a) (1976) .....11 & n, 12
Ariz. R. Civ. P. 4(e)(2) .....6, 7 & n, 14

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC.,
an Arizona corporation,

Petitioner,

v.

BAYCHEM CORPORATION, a New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,

Respondents.

BRIEF OF BAYER AG IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals affirming the judgment of the district court dismissing the complaint for lack of personal jurisdiction and on the ground of *forum non conveniens* has been reported in 556 F.2d 975 (9th Cir. 1977). The court rendered no opinion with its order denying the petition for rehearing.

RESTATEMENT OF THE QUESTIONS PRESENTED

The Petition's statement of the questions presented subsumes fundamental factual misstatements and erroneous legal conclusions, wholly unsupported by the record. For example, there is no evidence in the record (and it has not heretofore been suggested) that any sales relevant to this action were made in Arizona; there is no evidence in the record that Bayer AG (or, for that matter, Bayer de Mexico) had any knowledge of Petitioner prior to the commencement of this action, much less that Bayer AG "knew" that Petitioner had purchased insecticide from a distributor of Bayer AG's Mexican subsidiary and intended to use it on crops for shipment into Arizona; the evidence is uncontroverted that no Respondent was authorized to or did act as agent for any other Respondent at any time; and evidence is totally lacking to support Petitioner's conclusion that Bayer AG dominated or controlled its subsidiaries Baychem and Bayer de Mexico. Accordingly, the questions presented are not those stated in the Petition. Rather, the questions presented as to Bayer AG are as follows:

1. Did the court of appeals correctly affirm the district court's dismissal of Petitioner's complaint against Bayer AG for lack of personal jurisdiction where (a) Bayer AG had no contact with the State of Arizona (or any other state in the United States) except through the presence of a once-removed and wholly-independent subsidiary (Baychem) and (b) Petitioner's claim is based upon the effects of alleged misrepresentations in Mexico by a once-removed Mexican subsidiary (Bayer de Mexico) in connection with the sale in Mexico of a pesticide by an independent Mexican distributor (defendant Vamex) to growers in Mexico with whom Petitioner (or Petitioner's

Mexican subsidiary) allegedly had some dealings in Mexico?

2. Did the court of appeals correctly hold that the district court did not abuse its discretion in dismissing Petitioner's complaint on the ground of *forum non conveniens* where (a) the more convenient forum for litigating this matter is Mexico because the case necessarily turns on facts to be ascertained from Mexican residents and corporations in Mexico and on Mexican law and (b) there is no federal district court to which this case could be transferred?

RESTATEMENT OF THE CASE

Petitioner's statement of the case requires correction by specific reference to the record because it fails to acknowledge the following relevant aspects of the case:

First, Petitioner's statement creates the false impression that the alleged events that form the basis of Petitioner's claim took place in Arizona rather than Mexico. In fact, Petitioner's complaint sets forth purported causes of action against Bayer AG based upon alleged misrepresentations and breaches of warranty in Mexico concerning the use of a pesticide ("Tamaron") sold to Mexican growers (with whom Petitioner or its Mexican subsidiary had dealings in Mexico) by an independent Mexican distributor (defendant Vamex) of a once-removed Mexican subsidiary of Bayer AG (Bayer de Mexico). [R. 17-24, 95]* All events which purportedly took place in Arizona arose entirely from the decision by a subsidiary of Petitioner (or growers with whom Petitioner's subsidiary dealt) to ship a portion of a Mexican crop through an Arizona port of entry and thus occurred subsequent to all the alleged acts of the

*This refers to pages from the record on appeal.

Respondents. Pointedly, Petitioner's claim that misrepresentations were made and warranties were breached must rise or fall on the testimony of the persons in Mexico who were parties to those alleged transactions.

Second, Petitioner's statement that "Petitioner financed growers in Mexico, advancing them funds for the growing of bell peppers and other vegetables" [Petition at 6] obscures the fact that the party which dealt with the Mexican growers and allegedly acquired their crops (or some interest therein) was not Petitioner but, in the main, a Mexican subsidiary. Petitioner's own interrogatory answers confirm that it contracted "through its Mexican subsidiary to buy all the crops" at issue [R. 1045] and that its role was limited to advancing funds to its Mexican subsidiary [R. 1047].

Third, there is no support in the record for Petitioner's assertions that Bayer AG (or Baychem or Bayer de Mexico) had any knowledge of Petitioner or that the pesticide purchased by the Mexican growers with whom Petitioner (or its Mexican subsidiary) had dealings was to be used on crops which Petitioner intended to export from Mexico into Arizona and for consumption in the United States and Canada [Petition at 7]. Indeed, to "support" its statements, Petitioner cites only its complaint. [*Id.*]

Fourth, Petitioner's sweeping assertion that Bayer AG "dominates and controls its subsidiaries and agents, Baychem and Bayer de Mexico" [Petition at 14] is wholly unsupported by the record. Apart from its complaint [R. 10], Petitioner cites only its own summary of Respondents' responses to interrogatories [R. 1265-70]. Those responses, fairly read, evidence nothing more than the typical, ordinary relationship to be expected between a parent and its subsidiary corporations organized and operated as separate

companies. [R. 93-95, 97, 102, 104, 243, 287, 301, 314, 346, 359, 361, 366, 1008, 1010-11, 1019]* Completely lacking is any evidence of the kind which would, under the decided cases, have to be shown at a minimum before a court would be warranted in ignoring the separateness of the subsidiary and treating it as the alter ego or agent of the parent.

Fifth, Petitioner's repeated citations to its answers to interrogatories propounded by Baychem at R. 1049 and R. 1060 to buttress its assertions that Petitioner ordered the Tamaron from Vamex in Arizona and paid by checks drawn on an Arizona bank [*e.g.*, Petition at 7, 11] are a complete mystery. Those references show only that Petitioner claims to have spent money on insecticides, that Tamaron was purchased from Vamex "many times" for "use on plaintiff's crops" (without reference to where or by whom the purchases were made) and that Petitioner would supply specific information on each transaction at a later date (which it never did). Thus, the record does not support even this purported nexus between Arizona and the alleged transactions at the heart of Petitioner's claim.

Other errors which pervade Petitioner's statement of the case may be seen from the facts of the case recited in the opinion of the court of appeals.

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*Bayer de Mexico, which does business only in Mexico [R. 102, 104], is a subsidiary of Bayer Foreign Investments, Ltd., a Canadian corporation, which in turn is a subsidiary of Bayer AG [R. 95]. It is independently financed with a capital stock of 50 million Mexican pesos. [R. 97] Bayer de Mexico is not authorized in any way to act as Bayer AG's agent for any purpose. [R. 95] It operates as an independent business under the control of its own board of directors, maintains its own corporate books and records and conducts its own business in all respects as a separate concern. [*Id.*]

Baychem, a subsidiary of a Netherlands Antilles corporation which is a subsidiary of Bayer AG, is established and operates independently in the United States with a separate paid-in capitalization of more than $75 million. [R. 95]

The businesses of Bayer de Mexico and Baychem are entirely distinct from the substantial separate manufacturing operations of Bayer AG in Germany. [R. 93, 94]

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS THAT THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER BAYER AG IS CONSISTENT WITH INTERPRETATIONS BY ARIZONA COURTS OF THE ARIZONA LONG-ARM STATUTE AND WITH THIS COURT'S REQUIREMENTS OF CONSTITUTIONAL DUE PROCESS.

A. As a Matter of Arizona Law, Bayer AG Has Not Caused an Event to Occur in Arizona Out of Which the Claim Which Is the Subject of the Complaint Arose.*

Jurisdiction over Bayer AG is purportedly based upon Ariz. R. Civ. P. 4(e)(2) which provides for service of process upon corporations which have "caused an event to

*Preliminarily, Petitioner's argument that "the pleadings and other material should be construed favorably to the Plaintiff" [Petition at 23] stands on its head the long-standing rule of this Court that, once the existence of personal jurisdiction is appropriately challenged, the party asserting jurisdiction has the burden of establishing it and that a *factual* showing is required, beyond the mere allegations of the complaint. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936). Petitioner has failed to make the requisite factual showing.

Petitioner's plea that the jurisdiction question be reserved until trial [Petition at 23] has no merit. Contrary to the assertion that Respondents have "so far resisted" discovery [*id.*], all three Respondents answered exhaustive interrogatories and submitted lengthy affidavits setting forth the facts relevant to the jurisdictional issue. [R. 93-108, 140-46, 233-342, 343-760, 976-1038] Moreover, as noted in 2A *Moore's Federal Practice* ¶ 12.16, at 2352-54 (2d ed. 1975):

> "The emphasis of [Rule 12] (d) is in the direction of hearing such defenses prior to trial. Certainly it will be advisable generally to decide such defenses as lack of jurisdiction . . . of the person . . . promptly after they are raised, and not defer them to the trial."

Petitioner has raised nothing to warrant a deviation from this established procedure.

In any event, besides not meeting its burden of establishing jurisdictional *facts*, Petitioner has not satisfied the substantive requirements of Arizona law.

occur [in Arizona] out of which the claim which is the subject of the complaint arose."* Whether a defendant has caused an event to occur in Arizona within the meaning of Ariz. R. Civ. P. 4(e)(2) is, of course, a matter of Arizona law.

The Arizona Supreme Court has clearly stated that, to establish jurisdiction over a foreign defendant under the "caused an event" test of Rule 4(e)(2), the damage-causing *events* must have occurred in Arizona, "rather than merely the *effects* of those events." *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 542 P.2d 24, 28 (1975) (emphasis in original). Under the theories of Petitioner's complaint, all the alleged damage-causing *events* (misrepresentation by Bayer de Mexico or Vamex, breach of warranty by Bayer de Mexico or Vamex, violation of Mexican labeling laws by Bayer de Mexico or Vamex) took place in Mexico; only the alleged *effects* of those events (rejection of the crops, embargo, Petitioner's decision not to further finance exports) took place in Arizona. Thus, as a matter of Arizona law, no event has occurred in Arizona out of which the claim which is the subject of the complaint arose.

Petitioner cites only *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966), to support its contention that an Arizona court would have found that Bayer AG "caused an event to occur" in Arizona within the meaning of Rule 4(e)(2). That reliance is misplaced.

Phillips is a product liability case in which an Arizona resident sued the manufacturer of an allegedly defective baking dish for injuries sustained in Arizona when the

*Ariz. R. Civ. P. 4(e)(2) reads in pertinent part as follows:

> **"Summons; personal service out of state.** When the defendant is . . . a corporation . . . which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state."

baking dish broke in the plaintiff's hand. The Arizona Supreme Court sustained jurisdiction explaining that "[i]f [a manufacturer's] product is defective" jurisdiction may be sustained in the plaintiff's state if that was where the product was "consumed." 413 P.2d at 737-38.

The present case has none of the jurisdictional facts extant in a product liability case: Bayer AG did not manufacture the product Tamaron; the complaint does not allege that the product was defective, but simply that there were misrepresentations and breaches of warranty in Mexico concerning its registration for use on certain vegetables; and, in any meaningful sense, no injury occurred from the consumption of a product in Arizona.

More importantly, the very factors considered by *Phillips* "in determining whether it is fair to exercise jurisdiction over a nonresident manufacturer whose product has injured a resident plaintiff in this state" [413 P.2d at 738] lead necessarily to the conclusion that exercising jurisdiction would have been improper here. These considerations were: (1) the size and nature of the manufacturer's business; (2) the "economic independence of the plaintiff" ("he may not be able to afford a trip to another jurisdiction to institute suit" and "he may feel unable to cope with the prospect of traveling to a strange state") and (3) the nature of the cause of action and the location and availability of witnesses. *Id.*

Under the guidelines set forth in *Phillips:*

(1) Bayer AG did not manufacture the product Tamaron;

(2) Petitioner is not an impecunious consumer "unable to cope with the prospect of traveling" to the place of the alleged misrepresentations and breaches of warranty to bring its suit. Mexico is hardly "strange" to Petitioner which does business there and maintains a subsidiary there [R. 1045, 1047]; and

(3) Since the alleged misrepresentations and breaches of warranty took place in Mexico between Mexican residents [R. 1043-46, 1058, 1121-29], the location and otherwise questionable availability of the witnesses to these events further point to the unfairness of exercising jurisdiction over Bayer AG in Arizona.

Even assuming that the district court could extend its jurisdiction over Bayer de Mexico under Petitioner's theory, no proper basis exists for reaching beyond that company to Bayer AG in Germany. Such an extraordinary double (indeed, quadruple) jump would subject a foreign corporation to jurisdiction merely because one of its subsidiaries allegedly had knowledge of the marketing intentions of persons whose very existence was unknown to the foreign parent corporation. *Cf., Taylor v. Portland Paramount Corp.,* 383 F.2d 634 (9th Cir. 1967).

B. Any Decision Other Than the Ninth Circuit's, That the District Court Did Not Have Jurisdiction Over Bayer AG, Would Offend the Guarantee of Due Process.

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that a nonresident foreign corporation cannot be subjected to personal jurisdiction absent a satisfactory showing both that: (1) the defendant's activities establish a nexus of "minimum contacts" with the forum jurisdiction, it being "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" [*Hanson v. Denckla,* 357 U.S. 235, 253 (1958)]; and (2) the "maintenance of the suit [in the forum] does not offend 'traditional notions of fair play

and substantial justice.'" [*International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)].

The dismissal ordered by the district court was especially appropriate in light of those due process requirements.

Petitioner's sole basis for asserting jurdisdiction over Bayer AG is that a minor portion of the crops containing a residue of a product distributed by Bayer AG's once-removed subsidiary in Mexico found their way into Arizona. Since it was Petitioner's unilateral activity that took the crops from Los Mochis, Sinoloa, Mexico to Nogales, Arizona [R. 779], the teaching of *Hanson v. Denckla,* that "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State" [357 U.S. at 353], is directly opposed to Petitioner's jurisdictional claim. Indeed, the reasoning urged by Petitioner would inevitably lead to the absurd conclusion that Bayer AG could be sued in any state chosen by Petitioner as the point of entry for its crops, notwithstanding that Petitioner has exclusive control over where it chooses to transport the crops and Bayer AG has not in any way "avail[ed] itself of the privilege of conducting activities within the [chosen] forum state" [*id.*].*

Surely this is a case where Arizona's "contacts with the [alleged] cause of action are far too tenuous to merit subjecting the foreign corporation to suit here" and where, even giving full play to Petitioner's attempt to reach Bayer AG vicariously, the status of Bayer AG as "an effectively

*As shown in the previous discussion of Phillips v. Anchor Hocking Glass Corp., the present case has none of the salient features of a product liability case; accordingly, the product liability cases cited by Petitioner [Petition at 21] are as inapplicable to the constitutional issues as Phillips is to the "caused an event" question under Arizona law.

independent corporate entity—certainly not in a position conveniently to defend an action here—[is such] that to subject it to judicial process in [Arizona] . . . would be to impose an unconstitutional burden" [*Blount v. Peerless Chemicals (P.R.) Inc.,* 316 F.2d 695, 699, 700 (2d Cir. 1963)].

II

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER CIRCUIT IN HOLDING THAT THIS SUIT WAS PROPERLY DISMISSED ON GROUNDS OF *FORUM NON CONVENIENS* SINCE THE MORE CONVENIENT FORUM IS IN A FOREIGN COUNTRY.

Contrary to the Petitioner's contention, the enactment of 28 U.S.C. § 1404(a) (1976)* has not changed the rule that dismissal is proper under the doctrine of *forum non conveniens* where venue is more conveniently laid in a foreign country:

> "If the more convenient forum is another federal court, since 1948 the case can be transferred there under Section 1404(a) and there is no need for dismissal. *It is only when the more convenient forum is in a foreign country*—or perhaps, under rare circumstances, in a state court—*that a suit brought in a proper federal venue can be dismissed on grounds of forum non conveniens. Questions of forum non conveniens continue to arise with some regularity in*

*28 U.S.C. § 1404(a) (1976) provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

maritime cases and in other *cases involving foreign transactions.*"

15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3828, at 176-78 (1976) (emphasis added; footnotes omitted). Thus, where prosecution of the suit is more appropriate in a foreign jurisdiction, the federal courts retain "the inherent power . . . to refuse jurisdiction" and to dismiss such actions. *Prack v. Weissinger,* 276 F.2d 446, 448 (4th Cir. 1960). At least four circuits have so held,* and none has held to the contrary.

The cases cited by Petitioner as being to the contrary do not conflict with this rule.

Norwood v. Kirkpatrick, 349 U.S. 29 (1955), involved no foreign parties and no foreign transactions. The only issue in *Norwood* was whether the transfer of a case under 28 U.S.C. § 1404(a) (1976) from the Eastern District of Pennsylvania to the Eastern District of South Carolina was proper, even though the factors which led to the transfer would not have been a sufficient showing of inconvenience to warrant dismissal for *forum non conveniens* prior to enactment of the statute in 1948. The holding of *Norwood*—that the statute was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required by *forum non conveniens* [349 U.S. at 32] and that the order of transfer was proper—in no way conflicts

E.g., Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied,* 352 U.S. 871 (1956); Prack v. Weissinger, 276 F.2d 446 (4th Cir. 1960); J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 462 F.2d 998 (8th Cir. 1972); Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber, 513 F.2d 667 (9th Cir. 1975); and Yerostathis v. A. Luisi, Ltd., 380 F.2d 377 (9th Cir. 1967). *See also* Gross v. Owen, 221 F.2d 94 (D.C. Cir. 1955) (where more convenient forum was in a state court and case could not be transferred to another federal court, dismissal for *forum non conveniens* was proper).

with the Ninth Circuit's determination in this case that, under the stricter doctrine of *forum non conveniens,* venue is more properly set in a foreign country and the action should be dismissed.

Similarly, none of the other cases relied upon by Petitioner to show a conflict among circuits [Petition at 15] involved a foreign country as the more proper venue.*

Without attempting to list all the factors warranting the Ninth Circuit's (and the district court's) conclusion that Mexico is the more proper venue for adjudicating this case, it should be noted that, contrary to Petitioner's assertion that all the necessary witnesses are in Arizona, the fact is that all of the growers who purchased the Tamaron product from Vamex and to whom representations and warranties concerning use of the product on vegetables were allegedly made reside in Mexico; the alleged misrepresentations were made in Mexico by citizens of Mexico; the product was allegedly applied in Mexico; Petitioner (or its subsidiary) allegedly purchased the vegetables in Mexico; and two of the defendants in the action (Bayer de Mexico and Vamex) are located in Mexico. It would be extremely unfair to any defendant to require defense of the action outside Mexico, where all the relevant alleged events took place, where all

*Harbolt v. Carpenter, 536 F.2d 791 (8th Cir. 1976) (suggested venue: District of Kansas); Collins v. American Auto. Ins. Co., 230 F.2d 416 (2d Cir. 1956) (suggested venue: Eastern District of Louisiana); Kisko v. Penn Central Transp. Co., 408 F. Supp. 984 (M.D. Pa. 1976) (suggested venue: Western District of New York); B.M.Heede, Inc. v. West India Mach. & Supply Co., 272 F. Supp. 236 (S.D.N.Y. 1967) (suggested venue: District of Puerto Rico).

Moreover, Petitioner's intimation that the *forum non conveniens* doctrine may not be invoked to dismiss a case brought by a United States citizen [Petition at 15, 17] is squarely refuted by J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 462 F.2d 998 (8th Cir. 1972) (dismissing suit brought by an American corporation).

the witnesses who might have knowledge thereof are resident and where, under Arizona's "contacts theory" in choice-of-law cases, the law of Mexico must necessarily govern the substantive issues [*see Schwartz v. Schwartz,* 103 Ariz. 562, 447 P.2d 254 (1968)].

In sum, the district court did not abuse its discretion in applying *forum non conveniens* and the Ninth Circuit followed a unanimous line of authority in affirming.

III

NEITHER THE JURISDICTIONAL ISSUE, WHICH MAY BE DECIDED UNDER ARIZONA LAW WITHOUT REACHING PETITIONER'S CONSTITUTIONAL ARGUMENT, NOR THE *FORUM NON CONVENIENS* ISSUE, WHICH RELATES ONLY TO THE PROPRIETY OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION, MERITS THIS COURT'S ATTENTION.

Petitioner admits that, to establish jurisdiction over the foreign defendants, it must first fulfill the requirements of Ariz. R. Civ. P. 4(e)(2). [Petition at 19] The interpretation and application of Arizona's rules of civil procedure are matters of Arizona law. Since, as shown, Petitioner has failed, with respect to Bayer AG, to meet the "caused an event" test under Arizona authority, the constitutional issue raised by Petitioner need not be reached. A review of the application of an Arizona rule under Arizona decisions hardly warrants this Court's attention.

Concerning *forum non conveniens,* the only issue before this Court is whether the Ninth Circuit correctly held that the district court did not abuse its discretion in applying the doctrine and ordering a dismissal under the unique set of facts presented here. As the commentators have expressed the dictates of this Court, "appellate review is limited" "[b]ecause the application of forum non conveniens rests

heavily on the discretion of the trial court." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3828, at 192 (1976), *citing The Belgenland,* 114 U.S. 355, 368 (1885). Since the rules governing the application of the doctrine of *forum non conveniens* have been clearly set out by this Court [*e.g., Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947)], and since there is unanimity among the circuits that the doctrine may be applied to cases in which the more proper venue is laid in a foreign country, there is nothing raised by Petitioner's argument that deserves this Court's consideration.

CONCLUSION

For the foregoing reasons, the Court should decline to review this case by writ of certiorari.

December 21, 1977

Respectfully submitted,

JACK E. BROWN
PHILIP R. HIGDON
EUGENE D. COHEN
222 North Central Avenue
Phoenix, Arizona

Attorneys for Respondent, Bayer AG

Of Counsel:

BROWN & BAIN, P.A.
222 North Central Avenue
Phoenix, Arizona

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona corporation,

Petitioner,

v.

BAYCHEM CORPORATION, a New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,

Respondents.

BRIEF OF BAYER DE MEXICO, S.A. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN F. MOLLOY
Post Office Box 2268
Tucson, Arizona 85702

Attorney for Respondent,
Bayer de Mexico, S.A.

Of Counsel:

MOLLOY, JONES, DONAHUE,
TRACHTA & CHILDERS, P.C.

December 21, 1977

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
STATUS OF BAYER DE MEXICO, S.A.	2
THE EVENTS WHICH OCCURRED IN ARIZONA	3
DIFFICULTIES OF PROOF RECOMMEND A MEXICAN FORUM	7
THE COURT OF APPEALS DID NOT MISCONSTRUE THE FACTS	9
REASONS FOR DENYING THE WRIT	10
I. THERE WAS NO JURISDICTION IN THE TRIAL COURT OVER BAYER DE MEXICO, BOTH BECAUSE, ACCORDING TO ARIZONA LAW, THERE WAS NO "EVENT" IN ARIZONA OUT OF WHICH THE CAUSE OF ACTION AROSE, AND THE IMPOSITION OF SUCH JURISDICTION WOULD NOT BE "FAIR PLAY"	10
A. There Was No Event in Arizona	10
B. The Hauling of a Mexican Corporation Into an Arizona Court When that Corporation Has Done Nothing in the State of Arizona Would Violate Traditional Notions of Fair Play and Substantial Justice	13
II. THE DECISIONS BELOW AS TO *Forum Non Conveniens* DO NOT VIOLATE, BUT, RATHER, ARE IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT	14
A. There Is No Authority for Holding that 28 U.S.C. § 1404(a) (1976) Withdraws from the District Court the Power to Dismiss a Case Under the Doctrine of *Forum Non Conveniens*	14

PAGE

B. There Was No Abuse of Discretion in Exercising the Doctrine in this Case 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Burr v. *Renewal Guaranty Corp.*, 105 Ariz. 549, 468 P.2d 576 (1970) 8-9

Hanson v. *Denckla*, 357 U.S. 235 (1958) 13, 14

Hoffman v. *Goberman*, 420 F.2d 423 (3d Cir. 1970) 15

Houghton v. *Piper Aircraft Corp.*, 112 Ariz. 365, 542 P.2d 24 (1975) 11-12, 13

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 14

J.F. Pritchard & Co. v. *Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972) 15, 16-17

McGee v. *International Life Insurance Co.*, 355 U.S. 220 (1957) 14

Paper Operations Consultants International, Ltd. v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975) 15-16

Phillips v. *Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966) 11, 12

Powder Horn Nursery, Inc. v. *Soil & Plant Laboratory, Inc.*, 20 Ariz. App. 517, 514 P.2d 270 (1973) 11, 12

Prack v. *Weissinger*, 276 F.2d 446 (4th Cir. 1960) 16&n

Ross v. *Ross*, 96 Ariz. 249, 393 P.2d 933 (1964) 9

Schwartz v. *Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968) 9

Shaffer v. *Heitner*, 97 S. Ct. 2569 (1977) 14

PAGE

Taylor v. *Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967) 14

Vanity Fair Mills, Inc. v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) 15

Wojciuk v. *United States Rubber Co.*, 19 Wis.2d 224, 122 N.W.2d 737 (1963) 8

STATUTES AND RULES

Fed. R. Civ. P. 4(d)(7) 10

28 U.S.C. § 1404(a) (1976) 15

Ariz. R. Civ. P. 4(e)(2) 10

CAN. REV. STAT., c. 34, s. 1 (1968-69) (Pesticide Residue Compensation Act) 5n

CAN. REV. STAT., c. 38, s. 1 (1952-53) (Food and Drugs Act) 5n

CAN. REV. STAT., c. 50, s. 1 (1968-69) (Pest Control Products Act) 5n

Mex. Com. Code, art. 383 8

OTHER AUTHORITIES

Annot., 19 A.L.R.3d 13 (1969) 13

Annot., 27 A.L.R.3d 397 (1969) 13

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BRIEF OF BAYER DE MEXICO, S.A. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Bayer de Mexico asserts that there were only two questions fairly presented to the Court of Appeals as to which certiorari is now possible:

1. Did the Appellant establish sufficient facts upon which to base long-arm jurisdiction in Arizona over a Mexican corporation which did no business in Arizona and which is charged with causing nothing to occur in Arizona except a loss of profits to an Arizona corporation from business operations in Mexico?

2. Can there be circumstances which would justify a trial court in dismissing a complaint under the doctrine

of *forum non conveniens* when the complaint is brought by a U.S. corporation against a Mexican corporation arising out of business done by the U.S. corporation in Mexico?

STATEMENT OF THE CASE

The Petition for Certiorari is characterized by gross distortions of the record. Many assertions of fact are made which are totally unsupported by the record; other assertions are contradicted by the record. Before the Court of Appeals, these same charges were made, and found to be untrue by that court. In the Petition for Writ of Certiorari now filed, the distortions have become even more gross, to the point that at times the latest assertions are gainsaid even by the briefs filed below.

STATUS OF BAYER DE MEXICO, S.A.

Contrary to the assertion in the Petition, Bayer de Mexico is not a subsidiary of Bayer AG but, rather, is a subsidiary of Bayer Foreign Investments, Ltd., a Canadian corporation, with sole place of business in Toronto, Canada. Bayer Foreign Investments, Ltd., is a subsidiary of Bayer AG (141, 978). There is no evidence in this record that Bayer AG "centrally dominated [or] controlled . . . Bayer de Mexico" as asserted in the Petition (p. 5). References given simply do not support such an assertion. That Bayer de Mexico acted as separately as any subsidiary is established clearly in the record (141-43). The assertion that Baychem and Bayer de Mexico are ". . . the agents of each other" is without support. The only references given by the Petitioner for this wishful assertion are to the unverified Complaint.

The Agreement between Chemagro and Bayer de Mexico, found in the record at 1356-59, is totally unsupportive of the assertion that Bayer de Mexico was the "agent"

of Chemagro in the sale of Tamaron. There is absolutely no evidence in this record that Bayer de Mexico was selling Tamaron as an agent for anyone other than itself.

While it is true that Bayer de Mexico received "technical material" regarding the proper use of insecticides from both Bayer AG and Baychem, this certainly reflects the usual practice of any distributor of a trademark product. Likewise, there was a licensing agreement between Bayer de Mexico and Bayer AG by which Bayer de Mexico obtained the right to use the Bayer trademarks. An examination of this licensing agreement will indicate that it includes no more controls than would normally be imposed by any licensor (1326-28).

THE EVENTS WHICH OCCURRED IN ARIZONA

The Petitioner would have this Court believe that it advanced $1 million to finance the growing of vegetables "destined for importation into Arizona" and that the "[t]itle to the bell peppers vested at all times in Petitioner." The only reference to the establishment of the title of the bell peppers is to the unverified Complaint.

The actual record before the Court indicates that most of the advancements by Petitioner were to its Mexican subsidiary, Mizokami S.A. See Exhibit "A" to Petitioner's Answers to Interrogatories (1103-08). Petitioner has indicated that it bought all of the crops on the lands described in its complaint "through its Mexican subsidiary." Answer to Interrogatory 3(a) (1045). Petitioner failed in its answers to identify the officers, stockholders and directors of its subsidiary, Mizokami S.A. See Answer to Interrogatory 67 (1010).

Petitioner grossly exaggerates the role played by Arizona insofar as the projected exportation of these vegetables is concerned. In the first place, an unidentified but substantial portion of the vegetables financed by

Mizokami was consumed in Mexico. See Answers to Interrogatories 62 and 63 (1087-88). The unverified Complaint states that "approximately 90% of said garden vegetables are consumed in the United States and about 5% in Canada" (8). There is no establishment in the record that any substantial portion of these vegetables grown in Mexico will be consumed in the State of Arizona.

The Petitioner's statement would lead to the inference that the Respondents all knew that these vegetables could not be imported into the United States because of the residue of Tamaron. The record contains no such evidence. To the contrary, vegetables on which Tamaron had been used in prior years had been exported to the United States without incident prior to the March 1973 embargo (1251, 1091-94). Bayer de Mexico had no warning of the 1973 embargo (1031). There is no contention that the product sold, Tamaron, was itself either dangerous or harmful. Even Mizokami's own affidavits establish that Tamaron, as it was being used at this time in Mexico, was in no way harmful (1136). Tamaron was registered for use in Mexico (1022). It was first sold in Mexico in 1970 (1015). The label placed upon the chemical in Mexico indicated that it was "para uso en algodonero" (for use on cotton) (1022-23). During this time, official publications of the Mexican government recommended Tamaron generally for use on garden vegetables. See Bayer de Mexico's Exhibit to Interrogatory 92.

As to what vegetables were shipped for entry to the United States at Nogales, Arizona, it is patent that the Petitioner has overstated the record. There is no evidence in this record that "three individual trailers were unloaded from the train and were hauled by tractors through the international gate and across the border into Nogales, Arizona," as stated (Petition, p. 7). In the record (779, 1193), there is simply a reference to two "vans" bearing

identifications "PFT 110615" and "PFC 16046," and a "truck" with license "TU 8310, Sinaloa, Mexico." There is not even a showing that the F.D.A. took samples of these bell peppers in Arizona, nor is there any evidence that the F.D.A. "directed that Petitioner's bell peppers which had been imported into Arizona be destroyed, and they were destroyed" (Petition, p. 8). All references given to support these assertions are nonsupportive or are references to the unverified Complaint. The record itself contradicts these assertions. The two vans identified "PFT 110615" and "PFC 16046" actually ended up in Toronto, Canada (1181, 1182). The values stated for the totality of these two shipments in the Canadian customs records are $4,716 and $1,704 (*id.*). Only a portion of these two shipments was "voluntarily" disposed of in a "land fill" in Canada (1179-80).

Petitioner inaccurately asserts that the bell peppers destined for Canada were rejected by the Canadian authorities under a "reciprocity agreement with the U.S." (Petition, p. 8). The sole supportive reference is to Petitioner's own answers to interrogatories and those answers merely indicate that indeed Canada has its own statutes regulating the sale and use of insecticides and pesticides. None of the three Acts referenced details any reciprocal arrangements between the United States and Canada.*

As close as the record comes to establishing whether or not any vegetables financed by Petitioner were destroyed in Arizona is the news story provided by Petitioner in

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*CAN. REV. STAT., c.34, s.1 (1968-69) (Pesticide Residue Compensation Act); CAN. REV. STAT., c.38, s.1 (1952-53) (Food and Drugs Act); CAN. REV. STAT., c.50, s.1 (1968-69) (Pest Control Products Act).

its answers to interrogatories which quotes Abraham Klecks, Deputy Regional F.D.A. Director:

> " 'None [of the bell peppers] has been destroyed. All we need to do is turn them back at the border.'
>
> * * *
>
> HE [Klecks] SAID EPA officials have told the FDA the pestiticed [*sic*] levels detected pose no public health hazard, and no peppers have been seized in the United States." (Exhibit R to Plaintiffs' Answers to Interrogatories (1252)).

This same news story indicates that the embargo on green peppers covered the border from San Ysidro, California, to Brownsville, Texas, and that it was the result of "Monitor 4" residues on peppers. Bayer de Mexico does not have a monopoly on the sale of pesticides in Mexico. Monitor 4 is a Chevron product competitive to Tamaron. Compania Vamex de Los Mochis, alleged in the Petitioner's complaint to have sold Tamaron to the "growers" in Mexico, is an independent distributor which buys pesticide products from approximately fifteen manufacturers (1122).

Mizokami's answers to interrogatories establish beyond cavil that the vast majority of its claimed losses are by reason of unharvested vegetables which never left Mexico.*

*Mizokami's "Footnotes to Production Calculations" (1193) indicate the "[h]arvest was stopped March 17, 1973," and "again started on April 8, 1973." Exhibit O to Mizokami's Answers to Interrogatories (1193). In its Notes to Schedule 1 (1189), Mizokami identifies Schedule 1 as:

> "a recap of Mizokami Bros. of Arizona, Inc. invoices covering the expenses incurred, allowances made, crop losses, and any and all other expenses which occurred as a direct result of the use of Tamaron." (1189)

The total damage shown by Schedule 1 is $1,497,782.41 (1188). The major item included in this total is $1,346,505.24, which is referenced to Invoice #2531 (1228). An examination of this invoice indicates that it is supported by "Schedule 5", found at 1196-1206. Schedule 5 is a breakdown of estimated losses from the *178,094* wirebound cartons which were *not* harvested, as shown in Schedule 3 (1192).

DIFFICULTIES OF PROOF RECOMMEND A MEXICAN FORUM

Without bothering to establish the present residence of any of the witnesses mentioned, Mizokami asserts that the majority of the witnesses are available in Arizona. Again, Mizokami diverts from the record.

If this case goes to trial on the merits, Petitioner will be seeking to establish fraudulent misrepresentations as to the proper uses of Tamaron. The record is clear that all representations that were made were made in Mexico in the Spanish language.

Mizokami, in straining to show an Arizona nexus, asserts:

> "Petitioner purchased the Tamaron from Vamex, Bayer de Mexico's distributor, by checks drawn on an Arizona bank, for delivery in Mexico." (Petition, p. 7.)

There is absolutely no support for the assertion that any payments were made by checks drawn on an Arizona bank and the record is clear that all negotiations leading to the purchase of Tamaron by any of the "growers" referred to in Petitioner's complaint were in the Spanish language in the Los Mochis, Sinaloa, Mexico, area (over 550 miles from the forum).

If Petitioner is to recover for its losses, it must establish that Bayer de Mexico misrepresented its product.

These 178,094 cartons are a total of the 116,781 cartons "NOT HARVESTED ACCOUNT TAMARON" and 61,313 cartons "LOST ACCOUNT WORMS." Invoice #2531 (1228) shows a "credit" against estimated damages for *not* harvesting *178,094* cartons of bell peppers. The "credit" allowed is $2.811 per carton or a total credit of $500,622.23. Invoice 2531-1 (1229). There are similar credits for *not* harvesting 6,008 lugs of Japanese eggplants, "Credit Memo 2532-1" (1230); for *not* harvesting 1,260 lugs of "Eggplants (Round)," "Credit Memo 2533-1" (1231); and for *not* harvesting 14,219 wirebound cartons of Anaheim peppers, "Credit Memo 2530-1" (1228).

This would be the central issue of any trial on the merits and all witnesses in this regard are in Mexico, and most of them do not speak the English language. The varied difficulties encountered by the trial court in the interpretation of Spanish law and Spanish conversation would plague any trial in this country. An example of the type of misinterpretation that would be encountered is found at 1278, where the word "vendedor" is translated as "buyer."

There is no showing that the statute of limitations has run in Mexico. The only assertion made in the trial court as to a statute of limitations was that contained in the letter of opinion submitted by Mizokami of Licensiado Rosas, who referred only to Article 383 of the Code of Commerce, which was translated as:

> "C.C.Art. 383.—'The buyer who within five days after receiving the merchandise should not claim from the seller in writing the defects as to quality or quantity of the same, or which in thirty days, counted from the date that it receives the same should not present a claim due to hidden defects of the same, shall lose all action and right to file suit for said causes against the buyer.' [The last word undoubtedly refers to "seller."]" (1278).

The above quoted "statute of limitations" would clearly appear not to be a statute of limitations but to be a notice statute typically included in a commercial code pertaining to sales. If this statute is a defense to the subject action, then it is a defense in the United States also. *See Wojciuk* v. *United States Rubber Co.*, 19 Wis.2d 224, 122 N.W.2d 737 (1963). The most significant contact insofar as the sale of this insecticide is concerned is clearly in Mexico and would be governed by Mexican law. *Burr* v. *Renewal Guaranty Corp.*, 105 Ariz. 549, 468 P.2d 576 (1970); *Schwartz* v. *Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); and *Ross* v. *Ross*, 96 Ariz. 249, 393 P.2d 933 (1964).

THE COURT OF APPEALS DID NOT MISCONSTRUE THE FACTS

The Petition makes the unsupported assertion that the Tamaron was paid for by checks drawn on an Arizona bank (Petition at 7, 11)—a fact which, even if true, is of limited significance in the context at hand.

The Petitioner then goes on to assert that the Court of Appeals erroneously stated "that Petitioner sustained losses 'when United States Customs Officers turned back a shipment of bell peppers at the Mexican border.'" If the Court of Appeals failed to include the F.D.A. in this statement, it is certainly understandable in view of the categorical statements made in the briefs filed by Petitioner in the Court of Appeals:

> "The 'event' which gave rise to Appellant's cause of action was the refusal of the United States Customs Officials to allow the bell peppers to cross the border and to remain in Arizona." Appellant's Reply Brief in the Ninth Circuit, p. 18; and, see also, p. 7 of the Opening Brief.

The Petitioner characterizes as "amazing" the statement that "the business done in Arizona by Baychem was unrelated to the claim." This is a simple statement of undisputed fact in this record.

REASONS FOR DENYING THE WRIT

I

THERE WAS NO JURISDICTION IN THE TRIAL COURT OVER BAYER DE MEXICO, BOTH BECAUSE, ACCORDING TO ARIZONA LAW, THERE WAS NO "EVENT" IN ARIZONA OUT OF WHICH THE CAUSE OF ACTION AROSE, AND THE IMPOSITION OF SUCH JURISDICTION WOULD NOT BE "FAIR PLAY."

A. There Was No Event in Arizona.

In order to obtain jurisdiction over Bayer de Mexico in Arizona through registered mail, in Mexico, as was attempted here, Bayer de Mexico must have "caused an event to occur in this state [Arizona] out of which the claim which is the subject of the complaint arose," Ariz. R. Civ. P. 4(e)(2), adopted by reference by Fed. R. Civ. P. 4(d)(7).

Mizokami has completely failed to show any event occurring in Arizona from which its claim for damages arose. To support its position, Mizokami offered various affidavits (R. Vargas Ruiz, 1121-1129; Fraga, 1130-1137; Kellett, 1158-1163). The gist of these affidavits is that Bayer de Mexico, through an agent, gave improper information (1) to one of the stockholders of Compania Vamex de Los Mochis, the independent distributor, (2) to a man (not an agent or employee of Mizokami) who farms land in Mexico, and (3) (through a hearsay affidavit of a Mexican official and a grower) to numerous farmers in Mexico. There is no showing in these affidavits of anything happening in Arizona.

What these affidavits conclusively establish is that Bayer de Mexico did business in Mexico with citizens of Mexico and that Mizokami did business in Mexico with Mexican citizens.

Arizona decisions under this rule have always recognized the limitation of the requirement of an "event" in Arizona.

In *Phillips* v. *Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966), a product manufactured by defendant was present in Arizona and caused an injury in Arizona. In *Powder Horn Nursery, Inc.* v. *Soil & Plant Laboratory, Inc.*, 20 Ariz. App. 517, 514 P.2d 270 (1973), a California corporation, not doing business in Arizona, had sporadic requests for services from Arizona customers. The service was soil tests. The Arizona plaintiff requested and received soil analyses from defendant. The Arizona plaintiff, relying on the analyses, suffered damage to nursery stock in Arizona. The Arizona Supreme Court stated:

> "*If* we find that the defendant corporation has caused an event to occur in Arizona, then the Arizona courts have jurisdiction unless we find that the maintenance of the suit in Arizona courts would offend the due process 'traditional notions of fair play and substantial justice'. International Shoe Co. v. Washington, supra."

20 Ariz. App. at 520, 514 P.2d at 273 (emphasis added).

In the recent case of *Houghton* v. *Piper Aircraft Corp.*, 112 Ariz. 365, 542 P.2d 24 (1975), the Arizona Supreme Court carefully drew a distinction between "event" and "effect."

In *Houghton,* residence of plaintiff in Arizona and the continuing effects of an accident which took place in California were found an insufficient basis for establishing *in personam* jurisdiction over nonresident corporate defendants. Houghton was flying his plane in California. The propeller apparently broke off and the plane crashed instantly killing plaintiffs' daughter and extensively injuring

both plaintiffs. Less than one month after the accident, plaintiffs moved to Arizona. Piper Aircraft, the manufacturer of the plane, and Sensenich, manufacturer of the propeller, were served under Ariz. R. Civ. P. 4(e)(2).

Plaintiffs in *Houghton, supra,* contended that the nonresident corporate defendants had caused an event to occur in Arizona out of which the complaint arose in that their pain and suffering, including emotional distress over the death of their daughter, continued after they became residents of Arizona.

The court found the facts did not support the claim of jurisdiction:

> "Both cases [prior Arizona decisions cited] arose out of fact situations where the actual damage causing *events* occurred in this state rather than merely the *effects* of those events."

112 Ariz. at 369, 542 P.2d at 28 (emphasis by the court).

In the fact situation in this action, the claim is made for the "effects" of alleged "events" which all took place in Mexico. Petitioner has totally failed to establish any *event* occurring in Arizona upon which its claim for damages can be grounded—

1. No product marketed by Bayer de Mexico is now, nor has ever been, used in or present in Arizona, as was the case in *Phillips* v. *Anchor Hocking Glass Corp., supra.*

2. There was never any contractual relationship between Petitioner and Bayer de Mexico in Arizona or, for that matter, in Mexico, as there was in *Powder Horn Nursery* v. *Soil & Plant Laboratory, supra.*

3. The only connection between Arizona and the claim is the residence of Mizokami, and Petitioner's unilateral acts, as in *Houghton* v. *Piper Aircraft Corp., supra.*

In the cases cited by Petitioner, one single recurring theme appears—there was an event caused by the defendant within the forum state upon which personal jurisdiction was based.

B. The Hauling of a Mexican Corporation Into an Arizona Court When that Corporation Has Done Nothing in the State of Arizona Would Violate Traditional Notions of Fair Play and Substantial Justice.

To assert jurisdiction on the facts established by Mizokami would extend state process far beyond any previous case—indeed, far beyond the limits of constitutional due process.

In *Hanson* v. *Denckla,* 357 U.S. 235 (1958), the Supreme Court set a clear outer limit on state jurisdiction over nonresidents:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Id.* at 253.

This statement highlights the crucial difference between this case and reported cases in which nonresidents were held liable for acts done outside the forum state. *See, e.g.,* cases cited in Annots., 27 A.L.R.3d 397 (1969) and 19 A.L.R.3d 13 (1968).

In the instant case, "the requirement of contact with the forum state" can only be met by reference to *Mizokami's own* "unilateral activity." Bayer de Mexico did not come to Arizona, Mizokami's forum, nor did it deal in interstate commerce. *Rather, this case grows out of*

Mizokami's own economically agressive activities in going to Bayer de Mexico's home forum, dealing with Bayer de Mexico only through agents (the growers) who were themselves Mexican, and "invoking the benefits and protection of [the] laws" of Mexico. See Hanson v. *Denckla,* 357 U.S. at 253.

No court—in even the most expansive applications of long-arm jurisdiction—has ever based jurisdiction over a nonresident defendant on plaintiff's contacts with the residence of the defendant. *See Shaffer* v. *Heitner,* 97 S. Ct. 2569 (1977); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957); and *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).

Due process requires that jurisdiction be determined with reference to defendant's conduct which makes it fair to bring him to the plaintiff's forum, not vice versa. *See Taylor* v. *Portland Paramount Corp.,* 383 F.2d 634 (9th Cir. 1967). Yet, Mizokami here seeks to bring Bayer de Mexico, a Mexican corporation dealing only in Mexico with other Mexicans, into Federal court in Arizona because of dealings which Mizokami initiated through its own Mexican subsidiary acting only in Mexico. The logical extension of Mizokami's position compels the conclusion that a defendant can be sued wherever a plaintiff chooses.

II

THE DECISIONS BELOW AS TO *FORUM NON CONVENIENS* DO NOT VIOLATE BUT, RATHER, ARE IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. There Is No Authority for Holding That 28 U.S.C. § 1404(a) (1976) Withdraws from the District Court the Power to Dismiss a Case Under the Doctrine of *Forum Non Conveniens.*

Each and every case cited by the Petitioner wherein the court was held to have no power to dismiss involved fact

situations where a change of venue was appropriate. Certainly there is no intent expressed in the subject statute to deprive the district courts of this country of their inherent power to refuse jurisdiction of cases not within 28 U.S.C. § 1404(a) (1976)—cases which should have been brought in a foreign jurisdiction, rather than in the United States. *Vanity Fair Mills, Inc.* v. *T. Eaton Co.,* 234 F.2d 633 (2d Cir.), *cert. denied,* 352 U.S. 913 (1956). It would be a travesty on judicial administration if this Court were now to deprive its trial courts of this discretion. The district courts of this country are burdened enough with litigation without this escape valve being denied them.

There is no conflict among the circuits as to whether a district court has the power to dismiss a complaint on the ground of *forum non conveniens.* Petitioner cites cases in three circuits, the Second, Third and Eighth Circuits (Petition, p. 15), in an attempt to show that those circuits do not recognize the power to dismiss on the basis of *forum non conveniens.* In point of fact, however, both the Second Circuit, in *Vanity Fair Mills, Inc.* v. *T. Eaton Co., supra,* and the Eighth Circuit, in *J.F. Pritchard & Co.* v. *Dow Chemical of Canada Ltd.,* 462 F.2d 998 (8th Cir. 1972), have held that dismissals on that ground were proper. And in *Hoffman* v. *Goberman,* 420 F.2d 423 (3d Cir. 1970), the Third Circuit, presented with the argument that dismissal on the ground of *forum non conveniens* was improper unless there was a second forum available to the plaintiff in which he might obtain identical relief, found that it did not have to decide the question under the circumstances of that case. It has not subsequently ruled on the issue. Thus, all circuits which have ruled on this question are in agreement that a district court may dismiss a complaint on the ground of *forum non conveniens. See Paper Operations Consultants International, Ltd.* v. *SS Hong*

Kong Amber, 513 F.2d 667 (9th Cir. 1975) and *Prack* v. *Weissinger,* 276 F.2d 446 (4th Cir. 1969).*

B. There Was No Abuse of Discretion in Exercising the Doctrine in this Case.

The facts scream out that Mizokami does not want this action to be brought in Mexico. In its brief filed in the Court of Appeals it frankly admitted:

> "[O]ur research indicates the award [in Mexico], if any, would be nominal." Opening Brief, p. 70.

But if this is the law of Mexico, then it must be the law in this country, for this cause of action has all of its roots in this other country where Petitioner voluntarily entered into business. The bald assertion that Mexican law would give no relief may or may not be correct. The controverting affidavits of Licensiado Ricardo Rosas (166-168) and Licensiado Miguel Hernandez Romo (1274-1283) indicate that there is a forum in Mexico in which this complaint could be heard and relief afforded. Certainly the delay which the Petitioner has imposed upon itself by insisting on bringing this case in a forum which is completely foreign to the cause of action cannot now be used as a rationale to justify the bringing of the suit in the wrong forum in the first place.

The facts squarely place this action under the authority of *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd.,* 462 F.2d 998 (8th Cir. 1972). In that action plaintiff was a United States corporation which had been assigned an amount due to its Canadian subsidiary from Dow Chemical of Canada, Ltd. The court found that, although this assign-

*Petitioner incorrectly characterizes the case of *Prack* v. *Weissinger* as one involving foreign nationals (Petition, p. 15). Appellee/defendant was, rather, a United States resident.

ment was legally sufficient to establish jurisdiction, jurisdiction was declined because Pritchard had "made its bed" in Canada:

> "After all, appellant chose to make its Canadian subsidiary the sole performing party to the contract; it is located in Canada; appellant performed the contract there; and Canadian law was chosen by appellant to apply to all interpretations of it. Thus there is more than a Canadian nexus here. The whole case is Canadian. Appellant made his bed in Canada; now he must lie in it if he wishes to proceed."

462 F.2d at 1002.

Mizokami equally has made its bed in the ejido* farmlands of Sinaloa, Mexico.

*"Ejidos" are the economically deprived to whom the Mexican government had assigned the lands upon which the crops financed by Mizokami S.A. were grown.

CONCLUSION

The distortion of the facts indulged in by the Petitioner indicates the desperateness of its position. The decision of the trial court, as affirmed by the United States Court of Appeals for the Ninth Circuit, is amply supported by the record below. The opinion properly interprets Arizona law on out-of-state service and properly recognizes an inherent power to dismiss for *forum non conveniens* in unusual circumstances. The Petition should be denied.

Respectfully submitted,

JOHN F. MOLLOY
Post Office Box 2268
Tucson, Arizona 85702

Attorney for Respondent,
Bayer de Mexico, S.A.

Of Counsel:

MOLLOY, JONES, DONAHUE,
TRACHTA & CHILDERS, P.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona corporation,

Petitioner,

v.

BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,

Respondents.

BRIEF OF BAYCHEM CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. THOMAS CHANDLER
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona, 85701

Attorney for Respondent,
Baychem Corporation

Of Counsel:

JACK REDHAIR
ROBERT E. LUNDQUIST
CHANDLER, TULLAR, UDALL & REDHAIR
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

I. A DISTRICT COURT HAS INHERENT DISCRETIONARY POWER TO DISMISS A COMPLAINT ON THE BASIS OF *Forum Non Conveniens*, NOTWITHSTANDING 28 U.S.C. § 1404 (a) (1976) 9

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CASE AS AGAINST RESPONDENT BAYCHEM ON THE GROUND OF *Forum Non Conveniens;* THE NINTH CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION AND AFFIRMANCE WAS PROPER 12

A. Construction of the Pleadings and Other Materials Presented to the District Court on a Motion to Dismiss for Lack of Personal Jurisdiction or for *Forum Non Conveniens* 12

B. The District Court's Dismissal of this Case as Against Respondent Baychem on the Ground of *Forum Non Conveniens* Was Not an Abuse of Discretion 14

III. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI .. 18

CONCLUSION 19

APPENDIX

TABLE OF AUTHORITIES

PAGE

CASES:

B. M. Heede, Inc. v. *West India Machinery & Supply Co.*, 272 F.Supp. 236 (S.D.N.Y. 1967) 11

Burt v. *Isthmus Development Co.*, 218 F.2d 353, (5th Cir.), *cert. denied*, 349 U.S.922 (1955) 12

Collins v. *American Automobile Insurance Co.*, 230 F.2d 416 (2d. Cir. 1956) 10-11

Fitzgerald v. *Texaco*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S.1052 (1976) 9

Gross v. *Owen*, 221 F.2d 94 (D.C. Cir. 1955) 10

Gulf Oil Corp. v. *Gilbert*, 330 U.S.501 (1947) . 14, 15, 18

Harbolt v. *Carpenter*, 536 F.2d 791 (8th Cir. 1976) 11

Hoffman v. *Goberman*, 420 F.2d 423 (3d Cir. 1970) 18

Ireland v. *Woods*, 246 U.S.323 (1917) 18

J. I. Case Co. v. *NLRB*, 321 U.S.332 (1944)..... 18

J. F. Pritchard & Co. v. *Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972)...9-10, 11, 17, 18

Jensen v. *McInerney*, 299 F.Supp. 1309 (D.V.I., 1969) 13

Kisko v. *Penn Central Transportation Co.*, 408 F. Supp. 984 (M.D. Pa. 1976) 11

Norwood v. *Kirkpatrick*, 349 U.S.29 (1955) 10

Paper Operations Consultants International, Ltd. v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975) 9, 14, 18

Prack v. *Weissinger*, 276 F.2d 446 (4th Cir. 1960) 10

Rogers v. *Helvering*, 320 U.S.410 (1943) 18

PAGE

Schwartz v. *Schwartz*, 103 Ariz.562, 447 P.2d 254 (1968) 16

Timberlane Lbr. Co. v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) 13

United States v. *Orshek*, 164 F.2d 741 (8th Cir. 1947) 13

Vanity Fair Mills, Inc. v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S.871 (1956) ..10, 11

Yerostathis v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967) 10

STATUTES AND RULES:

28 U.S.C. § 1404 (a) (1976) 9, 14

SUP. CT. R. 19 18

FED. R. CIV. P. 12 (b)(2), (3) 12

OTHER AUTHORITIES:

1 J. MOORE, FEDERAL PRACTICE ¶ 0.145 (2d ed. 1975) 10

5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1363 (1969) 12

15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (1976) 10

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Respondents.

BRIEF OF BAYCHEM CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. Whether a district court has inherent discretionary power to dismiss a civil complaint on the basis of *forum non conveniens* where the only proper forum is in a foreign country.

II. Assuming the answer to the first question is positive, whether the district court abused its discretion in dismissing the complaint against Respondent Baychem on the ground of *forum non conveniens* where (a) allegedly Petitioner is an Arizona corporation with a subsidiary in Mexico who entered into agreements in Mexico concerning the

financing of crops grown in Mexico; (b) the claim arose out of the sale of an insecticide in Mexico, where alleged misrepresentations were made by a Mexican citizen or citizens to another Mexican citizen or citizens concerning the acceptability by the United States and Canada of bell peppers on which the insecticide was used; (c) it was conceded in the district court that the law of Mexico would apply to the case, and the complaint refers to and relies on the applicability of Mexican law; (d) most of the witnesses necessary for Respondents to defend this case are citizens of Mexico and beyond the process of the courts of the United States; and (e) the only matters forming a nexus between the forum in Arizona and the alleged wrong are that Petitioner resides in the forum, Respondent Baychem does business in the forum (in matters unrelated to the cause of action), and some of the peppers grown by Petitioner's business associates in Mexico were denied entry to the United States at a border station located in the forum.

(The matters raised by Petitioner's Questions Presented III, IV and V concern minimum due process contacts necessary for *in personam* jurisdiction over the other respondents. Respondent Baychem will defer to those parties for responses to these questions.)

STATEMENT OF THE CASE

Petitioner's complaint was filed below in October, 1973 (R. 6). Respondents timely filed motions to dismiss based on lack of *in personam* jurisdiction and on *forum non conveniens* (R. 71, 123 and 159). Numerous affidavits were filed by all parties, voluminous interrogatories were submitted and answered, and requests for production of documents were filed and complied with. The record alone in this case consists of over 1,400 pages plus hundreds of pages of exhibits filed as attachments to answers to interrogatories. It is on these affidavits, interrogatory answers and exhibits, and on memoranda and arguments of counsel that the District Court for the District of Arizona based its ruling herein and entered its judgment on May 27, 1975. Transcript of Hearing on the Motions to Dismiss at 43 (Supplemental Designation of Record on Appeal). Contrary to Petitioner's assertion which is inherent throughout its brief but is not specifically stated until page 23 thereof, in ruling on a motion to dismiss for lack of personal jurisdiction or on the basis of *forum non conveniens,* the "pleadings and *other* material" (Petition at 23, emphasis added), are not to be construed most favorably to the plaintiff or taken as true, but, rather, in considering such motions, the district court is to view the affidavits, interrogatory answers, and other evidence submitted in determining the facts to which the applicable legal principles are then applied. See III. A, *infra.* The district court determined the facts necessary for analysis under the applicable principles and, in the exercise of its discretion, dismissed the case as to all parties on the ground of *forum non conveniens,* and as to Bayer AG and Bayer de Mexico on the ground of lack of *in personam* jurisdiction. The Ninth Circuit Court of Appeals applied the appropriate standard of review and affirmed the district court in the opinion attached in the appendix to the Petition at pages A-1 through A-4. There are no special or important reasons for granting a writ of certiorari in this case.

Petitioner's complaint alleged losses due to the failure of a portion of a crop grown in Mexico to gain entry into the United States, because the crop, bell peppers, contained a residue of a pesticide called Tamaron. These bell peppers were grown, harvested and shipped in Mexico by a Mexican grower or growers allegedly financed by Petitioner's Mexican subsidiary corporation.

Tamaron was manufactured by Baychem. Baychem is a once-removed subsidiary of Bayer AG. Bayer de Mexico is a corporation formed under the laws of Mexico and is also a once-removed subsidiary of Bayer AG.

Contrary to Petitioner's assertion that "Bayer AG dominated and controlled its subsidiary, Baychem" (Petition at 5), the evidence adduced below did not establish this, nor does Petitioner's citation to R. 1265-1270 support this allegation. That citation is to a document entitled "Plaintiff's Summary of Defendants' Answers to Interrogatories" and is merely Petitioner's characterization of what it would like to have seen the trial court draw from those answers. Obviously, the trial court did not draw these conclusions, as indeed it should not have, since the Bayer AG-Baychem relationship involved only those incidents which are normal between a parent and subsidiary (R. 93-95, 97, 102, 104, 243, 287, 301, 314, 346, 359, 361, 366, 1008, 1010-11, 1019). The fact remains that they are independent corporations. Furthermore, Petitioner's allegation that Baychem and Bayer de Mexico are the agents of each other and therefore that the acts of Bayer de Mexico and Baychem became binding on each other is an argument not presented below and not supported by any legal authority. The evidence set forth in the citations listed by Petitioner establishes only that Baychem entered into an agreement with Bayer de Mexico, written in Spanish, which permitted the latter to solicit orders for the former's products. Any such order procured was not to be binding on Baychem until it had Baychem approval, the prices of Baychem's products were subject to change without notice, and Bayer de Mexico was in no way authorized to bind Baychem. (There is no evidence that Bayer de Mexico ever procured orders pursuant to this agreement.) This "agency" certainly is not such that the acts of "Bayer de Mexico and Baychem . . . became binding on each other" (Petition at 6).

The pepper crop was grown in Mexico in 1973. Tamaron insecticide was manufactured in the United States by Baychem and sold to Bayer AG.[1] Bayer AG in turn sold it to Bayer de Mexico. Bayer de Mexico in turn distributed Tamaron in Mexico through a completely independent Mexican entity called Vamex, who in turn allegedly sold it to the Mexican growers. Thus, the cause of action arose out of a sale of the pesticide in Mexico between citizens of Mexico. Central to the claim are the representations of employees of Vamex to the Mexican growers. The affidavits cited by Petitioner show these representations to involve what may have been said by representatives of Vamex to the growers, what may have been said by representatives of Bayer de Mexico to the growers, what may have been said by Bayer de Mexico to Vamex concerning the insecticide, and what may have been said by Vamex to the growers about what the employees of Bayer de Mexico had said to Vamex concerning the insecticide.

The assertion on page 6 of the Petition that Petitioner, rather than the Mexican growers, had purchased the Tamaron from Vamex was not raised below and there is no support for it in any of the materials presented to the Court

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[1]Baychem sent a document entitled "Technical Data Sheet" under the heading Chemagro, a division of Baychem, dated April, 1972 to Bayer AG (R. 314 & attached exhibit). In bold letters at the top, the document declared "FOR EXPERIMENTAL USE ONLY." *Id.* It further declared that "Monitor [Tamaron] is available for *testing* in the formulations listed below. It is required that the nature of a contemplated project be specified when requesting samples." *Id.* (Emphasis added.) On the second page of this document, another bold heading declares "FOR EXPERIMENTAL USE ONLY" and "the rates and uses mentioned in the following sections . . . *are not registered for commercial use* and are provided only for the information of and use by qualified persons engaged in *research or experimental activities.*" *Id.* (Emphasis added.) A second, similar document, dated March, 1973 entitled "Technical Information" was also sent to Bayer AG (R. 314 and second document included as an attachment to Answer to Interrogatory #221 [no page no. assigned]).

below. The Record at 1049 merely refers to a "consolidated financial statement" for the 1972-73 growing season which claimed insecticide as an expense by the growers and the Record at 1060 is simply unrelated to any such argument. Furthermore, Petitioner answered an interrogatory below by stating the contrary position that it bought crops "through" its Mexican subsidiary (R. 1045).

Petitioner states:

> "The Respondents knew that such Tamaron was being purchased by Petitioner for use on peppers grown for export into Arizona and for consumption in the United States and Canada . . . [and] both expressly and impliedly warranted that Tamaron was suitable for use on Petitioner's bell peppers intended for importation into Arizona." Petition at 7.

The only citations to the record offered in support of this assertion are to Petitioner's complaint. The extent of discovery and litigation subsequent to the filing of the complaint is manifest from the size of the record. As noted below, the allegations of Petitioner's complaint are not to be taken as true under such circumstances. Indeed, as to Baychem, the uncontroverted evidence before the district court establishes that Baychem did not have such knowledge, nor did it warrant anything to anyone other than what was expressed in its technical data sheets to Bayer AG (see n.1, *supra*).

Petitioner spends numerous paragraphs detailing "the events which occurred in Arizona" in its brief at 7-9. The only event of possible significance which occurred in Arizona is that when small portions of the peppers reached the United States border, and later Canada, they were denied entry because they contained a residue of Tamaron. The remainder of Petitioner's assertions are merely attempts to manufacture as many "events" as possible, which

are in reality merely incident to the rejection, and which could have no possible effect on the issues here involved. Moreover, many of these asserted "events" have no support in the record.

Petitioner further asserts in its statement of the case that the convenience of the witnesses favors Arizona. This statement is not correct—the convenience of *Petitioner's* witnesses may favor Arizona. Respondent Baychem would have been precluded from defending this case altogether had the district court accepted jurisdiction. Although Petitioner recognizes that "some other testimony of events occurring in Mexico may be needed . . . ", Petition at 10, it claims that both the quantity and quality of testimony concerning events in Arizona will be greater than that concerning the events in Mexico. This would surely be the case had this matter been tried in the District of Arizona and for good reason—witnesses necessary for Respondent Baychem's defense, such as the Mexican growers, employees of Vamex, and other potential witnesses would have been beyond the subpoena power of the courts of the United States. An absent witness produces no quantity or quality evidence.

Petitioner asserts that the "short statute of limitations in Mexico has run (1278, 1404)" (Petition at 10). The only evidence presented before the district court concerning the Mexican statute of limitations consisted of an affidavit of a Mexican lawyer filed by Respondents giving the opinion that the statute had not run (R. 163-169); Petitioner in response thereto filed a letter authored by another Mexican lawyer which contended that a different Mexican statute applied and that this statute had in fact run out. Thus, it is unclear whether the statute has run in Mexico. In any event, Petitioner has made no attempt to bring an action in Mexico. Furthermore, Respondent Baychem offered to waive the statute of limitations in Mexico in connection

with the appeal to the Ninth Circuit Court of Appeals if in fact the statute had run (Appendix at 1a).

Petitioner's attack on the opinion of the Ninth Circuit Court of Appeals in this matter is unavailing. That court, faced with this record, the briefs filed therein, and applying the correct standard of review in such a matter merely affirmed that the district court did not abuse its discretion in this case. It is readily apparent that the Ninth Circuit's statements that all transactions between the parties, as well as the claim itself, arose in Mexico and that the only effect alleged in Arizona was the loss to Petitioner by the failure of the vegetables to gain entry into this country are true. Petitioner's novel assertion that it, while in Arizona, purchased the Tamaron from Vamex, and that it had not been purchased by the Mexican growers from Vamex, is not supported by the record. Moreover, it is raised here for the first time. This contention, as well as the contention that Baychem sold the Tamaron knowing that some of it would be imported into Arizona on Petitioner's peppers, was dealt with above. Beyond this, however, Petitioner borders on the scandalous, when it implies that Baychem had recommended Tamaron (Monitor 4) for use on bell peppers to American farmers even though it had not been properly registered in the United States, but that Baychem "had not . . . been caught" (Petition at 12). There is no support for such an outlandish assertion. The citation to the record there contained is meaningless.

Petitioner carries its pettifoggery one step further when it asserts that the Ninth Circuit Court of Appeals confused Baychem, the U.S. subsidiary, with a foreign corporation. Anyone reading a pleading in this case can determine otherwise, and it has never been asserted otherwise. The statement of the Ninth Circuit quoted by Petitioner in support of this unusual assertion was preceded by an entire paragraph which gives it its meaning:

> "The Plaintiff falls back on its United States Citizenship as the sole and only possible basis for suing these Defendants in a Court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere." Appendix to the Petition at A-4.

This statement was obviously a general reference to foreign defendants in commercial situations involving personal jurisdiction questions and not to Baychem.

The other assertions advanced by Petitioner in this section of the brief have been previously discussed and will not be belabored here.

REASONS FOR DENYING THE WRIT

I

A DISTRICT COURT HAS INHERENT DISCRETIONARY POWER TO DISMISS A COMPLAINT ON THE BASIS OF *FORUM NON CONVENIENS*, NOTWITHSTANDING 28 U.S.C § 1404(a) (1976).

Notwithstanding the passage of 28 U.S.C. § 1404(a) (1976) in 1948, the district court retains the inherent discretionary power to refuse jurisdiction on the ground of *forum non conveniens*. *Fitzgerald* v. *Texaco*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Paper Operations Consultants International Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975); *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th

Cir. 1972); *Yerostathis* v. *A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967); *Prack* v. *Weissinger*, 276 F.2d 446 (4th Cir. 1960); *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Gross* v. *Owen*, 221 F.2d 94 (D.C. Cir. 1955); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.145 (2d ed. 1975). 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (1976).

Petitioner relies on a statement from *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955) to the effect that 28 U.S.C., § 1404(a) eliminated dismissal of an action for *forum non conveniens*. However, that case involved no foreign parties and no foreign transactions. The only issue before this Court in *Norwood* was whether the case should have been transferred from one district court to another district court where the factors which led to the transfer order would not have been a sufficient showing of inconvenience to warrant dismissal for *forum non conveniens* prior to 1948. This case held merely that the statute was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required by the doctrine of *forum non conveniens*, 349 U.S. at 32, and that the order of transfer was proper. *Norwood*, therefore, does not conflict with the Ninth Circuit's finding in this case that, because the district court does not have the power to transfer this case to the proper jurisdiction, Mexico, it has the inherent power to refuse the case after analysis under the stricter requirements of *forum non conveniens*.

Petitioner's assertion that there is a "conflict in the circuits" involving this question is shown untrue by an examination of the very cases cited by Petitioner. None of them involved a contention that a foreign country was the proper venue. *Collins* v. *American Automobile Insurance Co.*, 230 F.2d 416 (2d Cir. 1956) reversed a dismissal of a suit in the Southern District of New York where the dismissal was based on a finding that the proper venue was in the Eastern District of Louisiana. Moreover, *Collins* was decided by the Second Circuit about the same time as it decided *Vanity Fair, supra*, and the latter case held precisely the opposite of what Petitioner contends the former case stands for. It is obvious that the Second Circuit dealt with different issues in the two cases.

Similarly, *B. M. Heede, Inc.* v. *West India Machinery & Supply Co.*, 272 F. Supp. 236 (S.D.N.Y. 1967), involved a denial of a motion to dismiss or transfer to the District of Puerto Rico for *forum non conveniens*. *Harbolt* v. *Carpenter*, 536 F.2d 791 (8th Cir. 1976), reversed a dismissal of a suit in the Western District of Missouri for improper venue upon a finding that the proper venue was in the District of Kansas. Moreover, the Eighth Circuit did not overrule the previous Eighth Circuit case, *J. F. Prichard & Co., supra*, which held that the trial court has discretionary power to dismiss for *forum non conveniens* where a foreign venue was proper. *Kisko* v. *Penn Central Transportation Co.*, 408 F. Supp. 984 (M.D. Pa. 1976), granted a motion to transfer between district courts.

Thus, the district court has inherent power to dismiss a case for *forum non conveniens* where, after a proper analysis, it finds a foreign venue required. There is no conflict among the circuit courts concerning this point.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CASE AS AGAINST RESPONDENT BAYCHEM ON THE GROUND OF *FORUM NON CONVENIENS*; THE NINTH CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION AND AFFIRMANCE WAS PROPER.

A. Construction of the Pleadings and Other Materials Presented to the District Court on a Motion to Dismiss for Lack of Personal Jurisdiction or for *Forum Non Conveniens*.

Petitioner contends at page 23 of the Petition that pleadings and "other material should be construed favorably to the Plaintiff when considering a Motion to Dismiss based on lack of personal jurisdiction or proper forum." The very citations contained in the Petition at this point show this to be incorrect. 5 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1363 (1969), describes motions under Fed. R. Civ. P. 12 (b) (2) (lack of *in personam* jurisdiction) and (3) (improper forum), as defenses by way of abatement which do not go to the sufficiency of the pleading. *Id.* at 654. The burden is on the pleader to establish personal jurisdiction. *Id.* Thus such a motion to dismiss is to be decided by the trial court in the same manner as any other "speaking motion," namely, by examination of the discovery filed in court, affidavits, etc. With respect to a *forum non conveniens* motion, however, the district court and the Ninth Circuit properly placed the burden of showing improper venue on movant Baychem. *Id.* at 655; *Burt* v. *Isthmus Development Co.*, 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955). Both the district court and the Ninth District recognized the extreme burden placed upon

Respondents. However, this burden does not mean that Petitioner's pleadings and "other materials" cannot be overcome by suitable evidence presented to the district court. This principle is exemplified by *Jensen* v. *McInerney*, 299 F.Supp. 1309 (D. V. I. 1969), cited by Petitioner, where defendant's motion to dismiss for lack of personal jurisdiction failed:

> "The plaintiff contends that it is clear from the allegations of his complaint that the defendant, at the time of the plaintiff's injury, was transacting business and contracting to supply services or things in this territory . . . . these allegations may of course, later be proved by the defendant to be untrue, *but since defendant has not asked leave at this stage of the case to offer evidence to controvert them,* I must take them to be true for purposes of the present motion." 299 F.Supp. at 1312 (emphasis added).

Obviously a defendant may challenge the allegations of a complaint in the context of a *forum non conveniens* or personal jurisdiction motion. The record in this case shows that Petitioner's allegations were indeed challenged and overcome.

The other case cited by Petitioner, *United States* v. *Orshek*, 164 F.2d 741 (8th Cir. 1947), stated only that it was the defendant's burden to show that neither of them resided in that division of the district court if they were to challenge venue under the Miller Act, and that since defendants had not produced any affidavits or other evidence, and since both had been personally served within the district, venue was held to be proper. See also *Timberlane Lbr. Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (Summary judgment treatment not required for "speaking motion" to dismiss for lack of subject matter jurisdiction).

Therefore, the district court decided the *forum non conveniens* issue on the basis of the facts it found from the record herein. The application of the doctrine of *forum non conveniens* is entrusted to the sound discretion of the trial court and may be reversed only if it constitutes an abuse of discretion—it is not the reviewing court's role to decide how it would have ruled on the case had the facts been presented to it. *Papers Operations Consultants International, Ltd., supra,* 513 F.2d at 670.

B. The District Court's Dismissal of this Case as Against Respondent Baychem on the Ground of *Forum Non Conveniens* Was Not an Abuse of Discretion.

The principles governing federal *forum non conveniens* issues were set out in the opinion of Mr. Justice Jackson in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). There are generally two areas of inquiry when a court is confronted with a *forum non conveniens* motion (to be distinguished from a motion presented pursuant to 28 U.S.C. § 1404(a)): the private interests of the litigants and the public interests. In assessing the interests of the litigants, the factors relied on include plaintiff's initial choice of the forum; relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses; possibility of view of the premises, if that would be appropriate; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial for the parties; and all other practical considerations that make the trial of a case easy, expeditious, and inexpensive. This may be described as the nexus between the forum and the alleged wrong. In assessing the public interest, considerations include administrative difficulties that follow from court congestion; a local interest in having localized controversies decided at home and a

reluctance to burden the people residing in the forum with a case having nothing to do with that forum; and the appropriateness of having the trial of a diversity case in the forum that is at home with the law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself. *Gulf Oil Corp.* v. *Gilbert, supra.*

Although the plaintiff's choice of forum should rarely be disturbed unless on the balance it would be unfair and vexatious to the defendant to require him to litigate in that forum, the burden of showing vexation and unfairness certainly is not overwhelming. In the case *sub judice,* Petitioner's choice of the District of Arizona as its forum could only have been because it resided therein. This and the fact that the bell peppers were rejected by a border station which happened to be located in Arizona are the only facts connecting this case with the forum. This could hardly be called a nexus between the forum and Petitioner's case. On the other hand, the district court was presented with facts that showed that allowing the litigation to proceed in Arizona would be patently unfair and vexatious to the defendants. Concerning access to proof, the alleged misrepresentations and warranties were made by Mexican citizens in Mexico to other Mexican citizens. The laws and the statutes of Mexico were relied on in the complaint and the violations thereof were alleged to have occurred in Mexico. The witnesses as to these matters obviously could not be compelled to attend the trial of the case in Arizona, leaving Baychem in the position of having to defend a case made up of evidence produced by witnesses called by Petitioner, with no compulsory process available to obtain evidence from others who had knowledge of the allegations in order that they could be made to testify for Baychem. From the size of the record in this case, consisting mainly of discovery directed towards the jurisdictional and *forum non conveniens*

issues, it is clear that more discovery would be had and that many witnesses would be involved, most of whom would be beyond process. These include people having direct knowledge of the transactions which are the subject of the complaint, most of whom were present in Mexico where the Tamaron was allegedly sold in violation of Mexican law, where the insecticide was allegedly warranted and misrepresented to Mexican growers, where it was allegedly applied to Mexican crops pursuant to information furnished by Mexican citizens to the Mexican growers, and where such crops were subsequently harvested, packaged, and shipped by Mexican residents to the United States. Furthermore, with respect to Petitioner's alleged damages, an unidentified but substantial portion of the vegetables financed by Mizokami and turned back at the border may have been consumed in Mexico. (R. 1087-88) Although the total number of witnesses concerning all of the above aspects of the case can only be speculated, it is apparent that the number would be substantial. None of them could be compelled to be in attendance in the United States, whether in support of Petitioner's or Respondents' contentions. The only jurisdiction where a trial of this matter would be fair is Mexico.

Moreover, the complaint relies on Mexican law, and based on Arizona's choice of law principles, the law of Mexico would apply to the allegations in any event. *Schwartz* v. *Schwartz,* 103 Ariz. 562, 447 P.2d 254 (1968). Neither the parties nor the judge could offer clear translations and opinions of that Mexican law which was considered in the trial court. Transcript of the Hearing on Motions to Dismiss at 44 [Supplemental Designation of Record on Appeal]. It would be both unjust and improper for the district court inadvertently to apply Mexican law in a manner different from that which would govern if the Mexican courts conducted the trial. Mizokami can proceed in Mexico and that is the only proper forum.

With respect to the public interests of the forum, beyond the manifest unfairness to all of the Respondents, the litigation of this case in the district court in Arizona would impose an extreme burden on the resources of that court and the community. Once again, most sources of proof and material witnesses are located in Mexico; most witnesses are likely to speak only Spanish; any documents related to the litigation are undoubtedly written in Spanish; and it is conceded the case is to be governed by Mexican law. Thus, the language barrier would be an additional hardship imposed upon a district judge and an American jury attempting to understand, interpret and evaluate Mexican citizens' testimony and documents written in Spanish. The translations of questions and answers alone would automatically at least double the time ordinarily required for the testimony in the case. The case is so entirely Mexican that it brings to mind the comment of the Eighth Circuit in *J. F. Pritchard & Co., supra,* where, after dismissing a plaintiff's complaint against a Canadian defendant on *forum non conveniens* grounds because the plaintiff's Canadian subsidiary had contracted with defendant and then had assigned its rights to the plaintiff, the Court said:

> "There was more than a Canadian nexus here. The whole case is Canadian . . . . [Plaintiff] made his bed in Canada; now he must lie in it if he wishes to proceed." 462 F.2d at 1002.

Beyond the appropriateness of this admonition to the Petitioner here, it is simply unfair to Respondents to require them to litigate in an American court this Mexican cause of action which must be proved and defended against by Mexican witnesses, documents, etc., and the trial of which should rightfully be a burden carried by the courts of Mexico rather than by the United States and the District of

Arizona. *Gulf Oil Corp.* v. *Gilbert, supra; J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd., supra; Paper Operations Consultants International, Ltd.* v. *SS Hong Kong Amber, supra; Hoffman* v. *Goberman,* 420 F.2d 423 (3d Cir. 1970).

III

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Review on writ of certiorari is not a matter of right but of sound judicial discretion. *Ireland* v. *Woods,* 246 U.S. 323 (1917). Supreme Court Rule 19 provides that a writ will be granted only where there are special and important reasons therefor. It is to be exercised sparingly and only in cases of gravity and importance, *J. I. Case Co.* v. *NLRB,* 321 U.S. 332 (1944); *Rogers* v. *Helvering,* 320 U.S. 410 (1943), since, if carelessly exercised, it might defeat the very purpose of the Article creating the Supreme Court, and the act creating the courts of appeals. There seems to be no clearcut definition of what the term "special and important reasons" means, but it would seem that Petitioner would be obligated to call to the attention of the Court some reason of importance that would justify the granting of a petition for a writ of certiorari. Petitioner's attempt to make this case appear to be of particular significance fails upon examination of the cases its Petition cites.

CONCLUSION

There are no special and important reasons for the granting of a writ of certiorari in this case. There is no conflict among the circuit courts concerning the legal principles involved herein. The opinion of the Ninth Circuit Court of Appeals is not in conflict with previous opinions of this Court. The District Court for the District of Arizona correctly applied the legal principles and weighed the voluminous evidence presented to it before rendering its decision. That decision was not an abuse of discretion. Certiorari should be denied.

Respectfully submitted,

S. THOMAS CHANDLER

CHANDLER, TULLAR, UDALL & REDHAIR
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

Attorney for Respondent, Baychem Corporation

Of Counsel:

JACK REDHAIR

ROBERT E. LUNDQUIST

CHANDLER, TULLAR, UDALL & REDHAIR
1110 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701

Appendices

April 14, 1977

The Honorable Walter Ely
Judge, U.S. Court of Appeals
1621 U.S. Courthouse
Los Angeles, California 90012

Re: Mizokami vs. Baychem
No. 752991

Dear Judge Ely:

With reference to your question, "Will the Baychem Corporation waive any applicable statute of limitations which might be available if this litigation were filed in the country of Mexico?" the answer is that Baychem Corporation will waive any applicable statute of limitations which may or might be available to Baychem Corporation if the United States Court of Appeals for the Ninth Circuit affirms the decision of the District Court, District of Arizona, and if plaintiff in the above-captioned matter files in substance the identical lawsuit in the country of Mexico.

Your very truly,

CHANDLER, TULLAR, UDALL & REDHAIR

By .....

JR/sa
cc: John F. Molloy, Esq.
Jack Brown, Esq.
Wright W. Crummett, Esq.

Supreme Court, U. S.
FILED
JAN 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona Corporation, *Petitioner*

v.

BAYCHEM CORPORATION, a New Jersey Corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG., a corporation of the Federal Republic of Germany, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

F. TROWBRIDGE VOM BAUR
1700 K Street, N.W.
Washington, D.C. 20006

Of Counsel:

FLORENCE WEIGHT
RICHARD M. PRESTON
VOM BAUR, COBURN, SIMMONS & TURTLE

January 4, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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PETITIONER'S REPLY MEMORANDUM

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1. *We Stand by the Factual Statements of the Petition:*

The Briefs in opposition attack statements in the Petition as unsupported by the record. However, we stand by the facts there stated. One example of the extreme nature of Respondents' assertions relates to the events which occurred in Arizona. Bayer de Mexico asserts (p. 4, 5) that the statements in the Petition (p.

7) that three vans or truck trailers loaded with Petitioner's peppers crossed the border into Nogales, Arizona, and that the FDA in Nogales, Arizona, took samples of Petitioner's peppers when they arrived in Arizona, are unsupported by the record. We attach hereto at A-1, a copy of parts of pages 779-780 of the record on appeal which alone demonstrates the error of Respondents' assertions.

As for Petitioner's checks for the purchase of Tamaron drawn on an Arizona Bank, (pet. p. 6, 7, 11), these were described in the record on appeal as "records" of "individual transactions" showing the "money spent for insecticides". It was stated that such documents would be made available to Respondents (1049, 1060).

Appendix 1a attached to Baychem's Brief, an *ex parte* document, is not a part of the record on appeal and is improper. In any event, it does not meet the standards set forth in the Petition (p. 17), paragraph "Second".

2. *Conflict with the Norwood case:* Respondents argue the facts of *Norwood* v. *Kirkpatrick* 349 U.S. 29, L. ed. 789, 75 Ct. 544 (1955). But no Respondent appears substantially to deny that, under the holding and language of that case set forth in our Petition (p. 12), a District Court does not have the power to dismiss a complaint on the ground of *forum non conveniens.* Hence, we submit that it is clear that the decision below conflicts with the *Norwood* case.

3. *The Knowledge of Respondents that Tamaron was Being Exported to the United States on Petitioner's Vegetables:*

Bayer de Mexico admits (p. 4), that in the years prior to March, 1973, vegetables grown in Mexico

which contained Tamaron furnished by Respondents were exported to the United States without incident, as a regular practice (1251, 1091-1094). Thus we submit that Respondents knew, or should have known, that this practice would extend into March, 1973.

4. *Mexican Witnesses and Mexican Law:* Inasmuch as Respondent Bayer, A.G., has economic control over the other Respondents and their distributors, there should be no problem in making such Mexican witnesses as may really be necessary, available in Arizona.

As for Mexican law, the case is not governed by Mexican law, and Respondents, including Baychem (p. 2, 15, 16, 17) considerably overstate its possible applicability to this case. Violation of Mexican law is alleged in the Complaint only as an alternative theory (Record p. 24). The main theories of the Complaint are those of product liability based on misrepresentation and breach of warranty by reason of the events which occurred in Arizona when Respondents' chemicals exploded there in a legal sense, and created the catastrophe which produced this litigation. (Pet., p. 9, 11, 13).

With regard to the Mexican statute of limitations, Respondent Baychem is in error when it asserts (p. 7) that there is in the record on appeal "an affidavit of a Mexican lawyer filed by Respondents giving the opinion that the statute had not run. (R. 163-169)." The affidavit of the Mexican lawyer there set forth does not even deal with statutes of limitation. We submit that it is clear that the Statute of Limitations has run in Mexico. (Pet. p. 10).

Petitioner did not and does not do business in Mexico.

5. *The Allegations of the Complaint Should be Taken as True:*

We submit that, as pointed out in the Petition, (p. 23), the allegations of the Complaint should be taken as true, unless seriously controverted by other, reliable evidence, specific in character. But the opposing Briefs do not suggest that the portions of the Complaint relied on in the Petition are so controverted. Moreover, on F.R.C.P. 12(b) motions, "the allegations" of the Complaint may bear on "the nexus between the claim or the parties and the forum for purposes of determining the applicability of a long arm statute". Hence the allegations of the Complaint should be accepted as true. See 5 Wright & Miller, *Federal Practice and Procedure,* ¶ 1363, p. 654; *Idem,* ¶ 1068, 1069.

6. *Respondent Baychem Made Its Bed in the United States:*

To paraphrase the statements in Respondent Baychem's Brief, (p. 17), Baychem (a) incorporated in the United States; (b) produced Tamaron in the United States; (c) sold Tamaron in the United States for delivery in Mexico knowing, or being reasonably chargeable with the knowledge that some of the Tamaron so sold would be exported to the United States on vegetables purchased by Petitioner, a United States corporation; and (d) caused its chemical, Tamaron, to reenter the United States and there to violate United States law. Thus, we submit that a fairer way to describe Baychem's situation is:

> There was more than a United States nexus here—the whole case is a United States case. Defendant Baychem made his bed in the United States; now he must lie in it.

7. *The Extreme Decision Below is Unprecedented:*

For the first time in the history of the United States, and contrary to the *Norwood* case, the Court below denied access to the Courts of the United States to an American citizen seeking damages from another American citizen. We submit that this is grossly improper; and that a dismissal on the ground of *forum non conveniens* between two United States citizens,—regardless of the nature of the claim or where it arose, even though ours arose in Arizona—is improper. In addition, Petitioner has been left without a forum, and without a remedy. His claims have been arbitrarily extinguished, without due process.

Thus, this case appears to present an unusual opportunity for this Court to set ground rules for (a) the scope of jurisdiction in product liability cases; (b) the standards of due process in diversity cases; and (c) the applicability of *forum non conveniens* where an international element is present.

Respectfully submitted,

F. Trowbridge vom Baur
1700 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

Of Counsel:

Florence Weight
Richard M. Preston
vom Baur, Coburn, Simmons & Tuttle

January 4, 1978

APPENDIX

APPENDIX A-1

Excerpts From The Record On Appeal

Pages 779-780

(From the Affidavit of R. C. Kellett,
Secretary of Petitioner, sworn to 19 June, 1974)

"On Friday, March 16, a customs broker who handles our account, William Joffroy, advised our Nogales office that samples of pepper were being taken by the FDA from PFT 110615. This is the number of a van leased to the Mexican railroad along with many others by Pacific Fruit Express, a subsidiary of the Union Pacific and Southern Pacific Railroad. Our company used these vans to transport the packed vegetables from the packing plant in Los Mochis, Sinoloa to Nogales, Arizona.

"The contents of PFT 110615 were unloaded in the Nogales, Arizona warehouse pending result of laboratory tests by the FDA. The next day, Saturday, March 17, the Nogales office advised that a hold order had been issued by the FDA on two additional shipments of bell peppers, one in PFC 16046 and one in truck license TU8310, Sinoloa, Mexico. Later in the day, at approximately 6:00 P.M. of March 17, we were advised by the Nogales office that an embargo had been placed on all pepper by United States Customs at approximately 4:30 P.M., Saturday afternoon, March 17th. We were further advised that the reason for the embargo was that residues of an insecticide known in Mexico as Tamaron or in the United States under the trade name of Monitor 4 were found on the pepper."